EXHIBIT
A

State Office of Administrative Hearings

Lesli G. Ginn
Chief Administrative Law Judge

February 24, 2017

TO: **Stephen Journeay, Director**
Commission Advising and Docket Management
William B. Travis State Office Building
1701 N. Congress, 7th Floor
Austin, Texas 78701

Courier Pick-up

RE: **SOAH Docket No. 473-16-1861**
PUC Docket No. 45280

Compliant of Extenet Network Systems, Inc. Against the City of Houston for Imposition of Fees for Use of Public Right of Way

Enclosed is the Proposal for Decision on Part One of Bifurcated Hearing (PFD) in the above-referenced case. By copy of this letter, the parties to this proceeding are being served with the PFD.

Please place this case on an open meeting agenda for the Commissioners' consideration. There is no deadline in this case. Please notify the undersigned Administrative Law Judges and the parties of the open meeting date, as well as the deadlines for filing exceptions to the PFD, replies to the exceptions, and requests for oral argument.

Sincerely,

Wendy K. L. Harvel
Administrative Law Judge

Travis Vickery
Administrative Law Judge

Enclosure
xc: All Parties of Record

300 W. 15th Street, Suite 504, Austin, Texas 78701/ P.O. Box 13025, Austin, Texas 78711-3025
512.475.4993 (Main) 512.475.3445 (Docketing) 512.475.4994 (Fax)
www.soah.texas.gov

2/7

SOAH DOCKET NO. 473-16-1861
PUC DOCKET NO. 45280

COMPLAINT OF EXTENET NETWORK SYSTEMS, INC. AGAINST THE CITY OF HOUSTON FOR IMPOSITION OF FEES FOR USE OF PUBLIC RIGHT OF WAY	§	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS

TABLE OF CONTENTS

SOAH DOCKET NO. 473-16-1861
PUC DOCKET NO. 45280

COMPLAINT OF EXTENET NETWORK SYSTEMS, INC. AGAINST THE CITY OF HOUSTON FOR IMPOSITION OF FEES FOR USE OF PUBLIC RIGHT OF WAY	§ § § § §	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

PROPOSAL FOR DECISION ON PART ONE OF BIFURCATED HEARING

I. INTRODUCTION

ExteNet Network Systems, Inc. (ExteNet) filed a complaint with the Public Utility Commission of Texas (Commission) against the City of Houston (City or Houston) complaining that the City could not charge ExteNet franchise fees for placing equipment in the City's public right of way. ExteNet contends that it is entitled to place its equipment in the right of way without being subject to a franchise fee because it is a Certificated Telecommunications Provider (CTP) and subject to the provisions of Texas Local Government Code (Local Government Code) chapter 283 (Chapter 283). Chapter 283 exempts CTPs from municipal franchise fees and subjects CTPs to a state-wide regulatory scheme wherein each CTP is assessed a fee based on the number of access lines it has in a city's public right of way. Furthermore, because ExteNet only provides backhaul service,[1] which is not considered an access line, ExteNet contends it is not required to pay any fees under Chapter 283. Staff and the City disagree.

This case presents the situation of technological innovation moving faster than the law, an increasingly common occurrence. Staff and *amici* express concern that any final decision should only apply to this case only and should not seek to reclassify new technology into a statutory scheme that does not currently address the technology.[2] *Amici* suggest that the Commission open a rulemaking proceeding to address the technology. Chapter 283 foresaw that

---

[1] The parties dispute whether the service ExteNet provides should be considered backhaul. That issue is discussed in Section VI of this Proposal for Decision (PFD).

[2] The following entities filed *amicus* briefs or statements at various times during the proceeding: Texas Coalition of Cities and Texas Municipal League, Texas Cable Association, Level 3 Communications, LLC, Zayo Group, LLC, Crown Castle NG Central LLC, Comcast Phone of Texas, City of San Antonio, and TEXALTEL.

changes in technology or the market would likely require the Commission to review the definition of "access line" and established a mechanism whereby the Commission was directed to do so at least every three years.[3]

The Administrative Law Judges (ALJs) find that ExteNet's services fall within the scope of Chapter 283. Because ExteNet is a CTP providing backhaul service, ExteNet is not required to have a franchise agreement with the City, nor is it subject to the access line fees as established in Chapter 283. ExteNet's customers, Commercial Mobile Radio Service (CMRS) providers, already pay the City for their use of the right of way, and ExteNet's backhaul service is part of what is already covered in the CMRS providers' franchise agreements.

II. JURISDICTION AND NOTICE

The City contests the Commission's jurisdiction over this matter. The City asserts that the Commission does not have jurisdiction under Chapter 283 over an entity that is not a CTP. Staff and ExteNet disagree with the City and assert that the Commission has jurisdiction over this case.

The ALJs find that the Commission has jurisdiction. ExteNet is a CTP providing backhaul, and as such, is under the Commission's jurisdiction. How ExteNet provides backhaul within the context of Chapter 283, and thus is subject to the Commission's jurisdiction, is addressed throughout this Proposal for Decision (PFD). The Commission is charged with enforcing the provisions of Chapter 283 and with promulgating rules and reviewing those rules every three years to ensure that the rules adjust to current technology and market conditions.

No party disputes notice and those issues are addressed in the findings of fact and conclusions of law without discussion.

---

[3] Tex. Local Gov't Code § 283.003.

III. PROCEDURAL HISTORY

The procedural history is undisputed. ExteNet filed its complaint on October 23, 2015, contending that the City should not be permitted to impose fees on ExteNet for use of its right of way. Staff and the City filed motions to dismiss. ExteNet filed a request to certify the main legal issue in this proceeding to the Commission.[4] Staff did not oppose the certification if the Commission ALJ decided not to dismiss the case. The case was not dismissed, and the Commission did not decide the certified issue. Staff's and City's Motions to Dismiss were carried with the case, and are denied with the issuance of this PFD.

On January 13, 2016, the Commission issued an Order of Referral, referring the case to the State Office of Administrative Hearings (SOAH). The Commission subsequently requested briefing on the threshold legal issue of whether Chapter 283 applies to a CTP that installs a wireless distributed antenna system (DAS) in the public right of way, including fiber optic cables and an antenna. The Commission concluded the statute was ambiguous and referred that issue and others to SOAH. The case is bifurcated, and this PFD addresses the first three issues from the Commission's Preliminary Order.[5] Once a final order is issued on this portion of the case, the parties will propose a schedule for the second phase of the proceeding, if one is needed. The hearing convened on October 4, 2016, and concluded on October 5, 2016. The record closed on December 29, 2016, with the filing of proposed findings of fact and conclusions of law.

---

[4] The issue certified to the Commission was Preliminary Order Issue No. 3.

[5] Although this case is bifurcated, the PFD necessarily touches on Preliminary Order Issue No. 4, which asks what appropriate municipal right of way fees Houston may charge ExteNet.

IV. LAW AND POLICY BACKGROUND

A. Chapter 283[6]

The main purpose of Chapter 283 is to facilitate competition between all wholesale and retail providers of Local Exchange Telephone Service (LETS) while also establishing "a uniform method of compensating municipalities for the use of the public right-of-way."[7] The legislative deregulation of the local exchange telecommunications industry took place in Texas in 1995,[8] followed closely by federal deregulation in 1996.[9] Prior to deregulation, local exchange carriers (LECs) operated as local area monopolies. At the beginning of deregulation, the incumbent local exchange companies (ILECs) had various market advantages over the competitive local exchange companies (CLECs) that were attempting to enter the market.[10] One of the advantages that ILECs enjoyed included more favorable franchise agreements with cities for access to rights of way. In 1999, the 76th Texas Legislature enacted Chapter 283 to eliminate the anticompetitive practices resulting from such municipal-level franchise agreements.[11] Chapter 283 accomplished this by replacing the required city-by-city franchise agreements with a state-level regulatory regime that applies equally to both ILECs and CLECs.

By applying a state-level regulatory scheme, the legislature removed the uncertainty of separate franchise fee agreements having to be negotiated between providers and cities. The statute lists its policy goals: to encourage competition, reduce the barriers to entry for providers so that the number and types of services offered by providers continue to increase through

---

[6] As explained at the hearing on the merits, in the interests of judicial economy, the ALJs have borrowed directly from the parties' briefing in drafting this PFD.

[7] Tex. Local Gov't Code § 283.001(c).

[8] H.B. 2128, Acts of 1995, 75th Leg. Ch. 231, (PURA 1995), recodified in the Title 2 of the Utilities Code, Public Utility Regulatory Act, Subtitle C, Telecommunication Utilities; *see also*, City of Houston (COH) Ex. 3 at 11.

[9] Federal Telecommunications Act of 1996, 47 U.S.C. § 151 (1996).

[10] *See generally* Staff Initial Brief at 25; Tex. Local Gov't Code § 283.001(c).

[11] COH Ex. 3 at 15-17.

competition, ensure that providers did not obtain a competitive advantage or disadvantage, and fairly reduce the uncertainty and litigation of franchise fees.[12]

1. Certificated Telecommunications Provider

To enact the stated policies under Chapter 283, the legislature defined who was covered by the statute and defined a CTP as "a person who has been issued a certificate of convenience and necessity, certificate of operating authority, or service provider certificate of operating authority by the commission to offer local exchange telephone service or a person who provides voice service."[13] A CTP was then exempted from franchise agreements and city-level regulation and subject to a fee established under Chapter 283. "Notwithstanding any other law, a certificated telecommunications provider that provides telecommunications services within a municipality is required to pay as compensation to a municipality for use of the public rights of way in the municipality only the amount determined by the commission under Section 283.055."[14]

ExteNet holds Service Provider Certificate of Operating Authority (SPCOA) No. 60769 granted by the Commission in 2006.[15] ExteNet is certificated to offer LETS as evidenced by the Notice of Approval.[16] The Notice of Approval also specifies that ExteNet has committed to adhere to the service quality standards applicable to LETS.[17] The Notice of Approval authorizes ExteNet to offer LETS.

---

[12] Tex. Local Gov't Code § 283.001(a).

[13] Tex. Local Gov't Code § 283.002(2).

[14] Tex. Local Gov't Code § 283.051(a).

[15] *Application of ExteNet Systems, Inc. for a Service Provider Certificate of Operating Authority,* Docket No. 33365 Notice of Approval (Nov. 17, 2006).

[16] COH Off. Not. Ex. 18; COH Ex. 28, *Application of ExteNet Systems, Inc. for a Service Provider Certificate of Operating Authority*, Docket No. 33365, Notice of Approval (Nov. 17, 2006).

[17] COH Ex. 28 at 6.

Although ExteNet is a CTP with approval to offer LETS, it does not provide that service. Instead, it provides backhaul through a DAS. The City argues that ExteNet should not be considered a CTP because it does not provide LETS. The statute, however, does not distinguish between CTPs that provide LETS and those that do not. ExteNet argues that it is a CTP for purposes of Chapter 283, regardless of the type of service it provides. The City argues that the Commission has interpreted Chapter 283 to exclude CTPs that provide services such as cable or wireless, or are interexchange carriers; and the Commission has indicated that compensation from those providers would be outside the scheme of Chapter 283.[18] Thus, the City argues that ExteNet is similar to those types of providers and should be excluded from CTP coverage under Chapter 283.

Staff argues that ExteNet's interpretation of the CTP definition is too narrow. Although Staff agrees that ExteNet holds an SPCOA, Staff notes that once a provider is issued an SPCOA, the provider is directed to use the certificate expeditiously pursuant to 16 Texas Administrative Code § 26.111(j). Staff further notes that any certificate holder that has not provided service for 12 months must file an affidavit annually indicating that it maintains the required technical and financial services necessary to provide service.[19] As an enforcement mechanism, the Commission may hold a hearing to suspend or revoke the certificate if the certificate holder has not provided service within 24 months of being granted the certificate.[20] Staff asserts that these rules show that an entity must provide LETS or risk losing its certificate.

The ALJs find that ExteNet is a CTP under Chapter 283. As explained by ExteNet's witness Diane Barlow, H.B. 1777 was intended to apply to all CTPs, regardless of whether those CTPs provided telecommunications services over landlines or wireless.[21] Ms. Barlow testified that during the negotiations regarding H.B. 1777, it was clear that all CTPs, even those providing

---

[18] *See* COH Ex. 3 at 16-17.

[19] 16 Tex. Admin. Code § 26.111(j)(1).

[20] 16 Tex. Admin. Code § 26.111(j)(2).

[21] ExteNet Ex. 6 at 13.

only wireless services, would be included as a CTP.[22] Furthermore, the statute's plain language does not differentiate between classes of CTPs and does not create an exception for an entity that is a CTP not providing LETS.[23] The legislature could have carved out exceptions to the definition of CTP in the statute, but it did not. The ALJs decline to read into a statute an exception that was not included when the statute was written.

Certainly, the Commission has, by order, specifically interpreted Chapter 283 to exclude certain types of services, as argued by the City. But the Commission has not addressed the specific issue presented here, whether a CTP providing backhaul with a DAS system is included under Chapter 283. However, the Commission has held that a CTP not providing LETS but providing nonswitched point-to-point service is a CTP for purposes of Chapter 283.[24] The statute's plain meaning and Commission precedent results in the conclusion that ExteNet is a CTP. The ALJs further conclude that ExteNet is a CTP providing backhaul service.[25]

The ALJs also do not dispute Staff's contention that if the Commission wanted to revoke ExteNet's certificate after 24 months of not providing LETS, the Commission has that power, subject to ExteNet's due process rights. However, in the more than 10 years that ExteNet has held its SPCOA, the Commission has not taken that action.[26] If the Commission wanted to specifically exclude ExteNet's services from the framework of Chapter 283, the proper mechanism to do so would be through a rulemaking where the Commission could, as directed by statute, review changes in technology or the market to determine whether to change the definition of access line. Unless and until the Commission does so, as a CTP providing backhaul service, the ALJs find that ExteNet is a CTP for all purposes under Chapter 283.

---

[22] ExteNet Ex. 6 at 13.

[23] Tex. Local Gov't Code § 283.002(2).

[24] *Complaint of Metromedia Fiber Network Services, Inc. Against the City of Carrollton, Texas Under the Public Utility Regulatory Act and HB 1777*, Order on Certified Issue (Sept. 28, 2001).

[25] The issue of backhaul is addressed in detail under the discussion of Preliminary Order Issue No. 2.

[26] There was no evidence presented that ExteNet is out of compliance with any of the terms of its SPCOA.

2. Access Lines

In general, the parties agree that ExteNet has no access lines. However, the parties dispute how that should affect the outcome of this case. ExteNet contends that because it has no access lines, it is not subject to fees for access lines under Chapter 283. Staff notes that with zero access lines, under the Chapter 283 methodology, ExteNet would pay no fee under Chapter 283, which Staff contends is an absurd result. Although there is no dispute that ExteNet's backhaul service should not be classified as an access line, the ALJs outline the legal background in some detail because Chapter 283 allows the Commission to change the definition of an access line and directs the Commission to review new technology and the market at least every three years to determine whether changes need to be made to the definition.

At the time it was passed, Local Government Code Section 283.055 directed the Commission to establish not more than three categories of access lines. For each city, the Commission was to set a fee to be applied to each category of access line so that each city would receive the same amount of revenue after H.B. 1777 was enacted as it had received under the franchise regime. The statute was drafted to be revenue-neutral.[27] Chapter 283 delineated three types of access lines:

> (1) switched transmission path physically within a public right of way extended to the end-use customer's premises within the municipality that allows the delivery of LETS within a municipality;
>
> (2) each termination point of a nonswitched telephone or other circuit consisting of transmission mediation within a public right of way connecting specific locations identified by and provided to the end-use customer for delivery of nonswitched telecommunications services; or
>
> (3) each switched transmission path within a public right of way used to provide central office-based PBX-type services for systems of any number of stations within the municipality.[28]

---

[27] Tr. at 236-39, 248, 257.

[28] Tex. Local Gov't Code § 283.002 (1)(A); PBX means private branch exchange.

The statute further states that the definition of access line does not include interoffice transport or other transmission media that do not terminate at an end-use customer's premises. Furthermore, Chapter 283 also states that the statute may not be construed to permit duplicate or multiple assessments of access line rates for the provision of a single service.[29]

Some types of access lines were excluded from the access line count, with full knowledge that no direct compensation would be paid to cities for the excluded and uncounted lines.[30] Specifically, the statute states, "[T]he compensation paid under this chapter constitutes full compensation to a municipality for all of a certificated telecommunications provider's facilities located within a public right-of-way, including interoffice transport and other transmission media that do not terminate at an end-use customer's premises, *even though those types of lines are not used in the calculation of the compensation.*"[31]

After Chapter 283 was passed, the Commission opened a rulemaking project to implement the new law. As a result of that proceeding, certain types of lines were designated as lines not to be counted as an access line. During the process, the Commission considered input from parties on the issue of whether backhaul to wireless providers used solely for the purpose of providing wireless telecommunications services would be counted as access lines. At the conclusion of the process, the Commission decided not to count backhaul services as an access line, *without distinguishing among different types of backhaul facilities*.[32] This provision has not changed since it was adopted.[33] However, because the statute was revenue-neutral, whether the lines were counted or not, the cities still received the same total compensation as they had received under the earlier franchise-fee scheme.

---

[29] Tex. Local Gov't Code § 283.002(1)(B).

[30] Tex. Local Gov't Code § 283.052(f).

[31] Tex. Local Gov't Code § 283.056(f) (emphasis added).

[32] 16 Tex. Admin. Code § 26.465(f)(2), (3).

[33] *Implementation of HB 1777*, Project No. 20935, Proposed New 26.467 Relating to Rates, Allocation, Compensation, Adjustments and Reporting as Approved for Publication at the December 16, 1999 Open Meeting (*Access Line Counting Rule Order*).

There is generally no disagreement that ExteNet has no access lines as that term is currently defined in Chapter 283 and the Texas Administrative Code. Chapter 283 defined the term "access line" when it was enacted.[34] However, the legislature anticipated that, due to changes in technology or in the market, the definition of access line might need to change and specifically gave the Commission the power to change its statutory definition.[35] Based on the testimony provided, the technology ExteNet is using (DAS) was either not used or was not widely used at the time Chapter 283 was written.[36] However, the legislature was certainly aware that new technologies would come into the market and that the market would change. Thus, the legislature enacted Chapter 283 to allow for market and technological changes, thereby avoiding potential high costs, additional fees, additional litigation, and local regulation that could serve as a barrier to entry of new participants and new technologies. As explained below, the ALJs find that ExteNet is providing backhaul service, which is not counted as an access line. If the Commission determines that backhaul service provided by a CTP to wireless carriers should be counted as an access line, a rulemaking can be opened under the statute and, after the rule is enacted, ExteNet would then be subject to the revised definition of access line and any resulting fees. However, under Chapter 283 and the current substantive rules, ExteNet is a CTP providing backhaul service, which is not compensable to the City as an access line.

3. Base Amount

H.B. 1777 replaced a system of individual city franchises with a uniform, state-wide system of fees to be paid based on access lines located in a municipal right of way. The statute was a make-whole statute; that is, the access line fees each city was to receive under the new system were intended to equal the franchise fees each city was receiving in 1998.[37] The legislature set forth how the "base amount" was to be determined: franchise, license, permit, and application fees plus in-kind services or facilities were to be included, but taxes, special

---

[34] Tex. Local Gov't Code § 283.002(1).

[35] Tex. Local Gov't Code §§ 283.002(1)(A), 283.003.

[36] *See* Tr. at 206-08; ExteNet Ex. 1 at 9.

[37] Tr. at 236.

assessments and pole rental fees were to be excluded.[38] The base amount was the target; the access line fees when multiplied by the number of access lines to be counted was to equal that dollar amount for each city. To determine the base amount, each city totaled the compensation received in 1998 under its franchise agreements with CTPs.[39] After determining the base amount, each city then totaled the number of access lines and divided the total base amount by the allocated number of access lines to determine the proper fee to be assigned to each type of access line.[40]

One of the first tasks to be performed in implementing H.B. 1777 was to determine how much money in fees and in-kind services or facilities the cities received in 1998. Staff issued questions seeking comments and held a workshop before proposed Rule 26.463 was published for comment.[41] The Commission considered the comments that were filed and adopted Rule 26.463 on October 21, 1999.[42]

There have been no substantive amendments to this rule since its adoption; the base amount has never been, and was not required to be, recalculated. The determination of the base amount established the target amount of revenue each city was to receive under the new access line fee regime so that cities would be kept whole. H.B. 1777 expressly recognized that the telecommunications industry and market conditions are fluid; it authorized the Commission to address those changes through a Commission determination of "whether changes in technology,

---

[38] Tex. Local Gov't Code § 283.053(a), (b).

[39] Tr. at 156-58.

[40] *Implementing HB 1777, Commission Order Adopting Rule § 26.463*, Docket No. 20935, (Base Amount Order) at 6-7 (Approved Oct. 21, 1999, signed Oct. 27, 1999). Each category of access line had a different allocation factor.

[41] *Implementation of HB 1777*, Project No. 20935, Second Set of Questions at 2-3, filed July 23, 1999. (PUC Interchange Item 37); Proposed New § 26.463 relating to Calculation and Reporting of a Municipality's Base Amount as approved for publication at the August 27, 1999 Open Meeting and Submitted to the Texas Register. (PUC Interchange Item 70).

[42] *Implementation of HB 1777*, Project No. 20935, Order Adopting new § 26.463 as Approved at the October 21, 1999 Open Meeting and Submitted to the Secretary of State.

facilities, or competitive or market conditions justify a modification" in the definition of or categories of access lines.[43]

Staff argues that although ExteNet is a CTP, it does not provide LETS or any service that contains an access line. Staff asserts that to ensure compensation paid to municipalities is not unequally born by LECs, ExteNet should compensate the City outside of the framework of Chapter 283. Staff argues that this is good policy, because as wireless technology progresses, the number of LETS access line fees paid to cities declines. Staff contends that if backhaul facilities provided to wireless carriers are included under Chapter 283, then the system may become unworkable.[44]

According to the City, ExteNet's argument ignores the reason certain transmission media do not count as access lines. The goal of Chapter 283 was to prevent the double recovery of revenue for use of a city's right of way.[45] The City asserts that, when H.B. 1777 was implemented, all revenue associated with providing backhaul was subject to a city's franchise fee ordinance. Therefore, that money was included in the base amount, which was then divided by the number of access lines. If the backhaul were counted again and subject to another fee, then a city would recover for it twice. Finally, the City argues that the Texas Constitution prohibits a city from granting use of its rights of way to a private entity for free.[46] Thus, under the Chapter 283 methodology, it is receiving compensation for backhaul because backhaul was included in the calculation of the base amount. If backhaul were specifically carved out again and included as a separate category, then the City would recover for it once under the base amount and again separately, which was not the purpose of the statute.

Both Staff and the City assert reasonable policy arguments about access lines and the loss of revenue. It is also reasonable to assert that excluding all backhaul prevented double recovery.

---

[43] Tex. Local Gov't Code § 283.003.

[44] Staff Initial Brief at 20-22.

[45] City Initial Brief at 58-59, *citing* COH Ex. 3 at 20.

[46] City Initial Brief at 63, *citing* Tex. Const. Art. III, § 52(a); Tex. Const. Art. XI, § 3.

The Commission may undertake a rulemaking or establish policy regarding its interpretation of the statute. However, the facts of this case, and the current state of the law, demonstrate that ExteNet is a CTP providing backhaul service, which is not counted as an access line.

B. Chapter 283 Conclusions

The legislature anticipated that market conditions and technology would change in the field of telecommunications. To ensure that Chapter 283 remained relevant and applicable to the market, the legislature included a provision for Commission review. Under the statute, between March 1, 2002, and September 1, 2002, the Commission was required to review whether changes in technology, facilities, competitive or market conditions justified a modification in the categories of access lines, or a new definition of access line.[47] Chapter 283 directs that after September 1, 2002, the Commission must make the same determination at least once every three years.[48] Although a review is statutorily required every three years, the last time the Commission reviewed its access line rules was in 2010.[49]

Staff asserts that if ExteNet is not required to pay franchise fees, it would lead to the absurd result of ExteNet being able to use the public right of way for free, which is not what the statute intended. Staff is also concerned that the City's argument could exclude from Chapter 283 services that are currently covered. Staff contends that if the City's interpretation of backhaul is adopted, it would limit Chapter 283 by excluding more CTPs than those seeking to install DAS in the rights of way. On the other hand, Staff is concerned that if ExteNet's interpretation is adopted, it would expand Chapter 283 to include CTPs that provide backhaul facilities to CMRS carriers. Staff alleges that both interpretations would reshape the current regulatory landscape. Therefore, Staff supports an interpretation of the statute that would

---

[47] Tex. Local Gov't Code § 283.003(a).

[48] Tex. Local Gov't Code § 283.003(c).

[49] *PUC Rulemaking to Revise the Definition of Access Line and the Categories of Access Lines Pursuant to Local Government Code Chapter 283*, Docket No. 37498 (Aug. 13, 2010).

exclude a CTP that does not provide LETS but provides DAS facilities that it wants to locate in a city's right of way.

The ALJs find that Staff's argument ignores the plain language of the statute, which does not distinguish between CTPs that provide LETS and those that do not. Under Staff's argument, ExteNet would be required to enter a franchise agreement with Houston and any other city where it provides DAS service, until such time as ExteNet provided LETS. Once ExteNet started providing LETS, it would then fall under the rubric of Chapter 283 and it would not be required to pay a franchise fee for its backhaul facilities. Staff's suggestion is one of policy, which is a question for the Commission to address. It is not, however, what the ALJs recommend because the plain language of the statute applies to all CTPs, including ExteNet, with no inquiry into whether a CTP actually provides LETS.

The ALJs also conclude that Chapter 283 applies to CTPs that provide backhaul. The City and Staff have questioned what constitutes backhaul and how far the term extends. Chapter 283 does not define or even mention backhaul. When the Commission was developing its implementation rules, the issue of how to distinguish backhaul for wireless providers was raised, and yet no distinction was recognized in the rules. The Commission's rules do not define backhaul, and only mention that term twice – as an exception to being classified as an access line. Considering the explicit goals and policies of the legislature, the ALJs recommend that the best approach, *in this specific case*, is to adopt an expansive view of backhaul and find that ExteNet's backhaul is covered by Chapter 283.

Because all of a city's compensation for a qualifying entity's use of its right of way is limited to one total amount, the base amount, CTPs that provide backhaul do not compensate a city for access. To avoid double-counting of fees that would be passed on to the end consumer, the law prohibits more than one fee for a single service.[50]

---

[50] Tex. Local Gov't Code § 283.006(a).

Using the parties' interpretations of the law, there are two possible outcomes in this case. One is that even though ExteNet provides backhaul, it should not receive the single-fee protection of Chapter 283 because its customer, the retail provider, is Verizon Wireless (Verizon), a CMRS provider. The second outcome is that because ExteNet is a CTP providing backhaul it should be covered by Chapter 283's exception. The ALJs recommend that the latter because it is more consistent with the plain statutory language and stated purpose of Chapter 283.

V. PRELIMINARY ORDER ISSUE NO. 1[51]

ExteNet provides a wholesale DAS service to CMRS providers. This service extends from an antenna located on a utility pole back to the CMRS provider customer's hub location. DAS routes customers' cellphone calls to the CMRS provider's hub and switch to allow the CMRS provider to connect the caller to the person being called. ExteNet proposes to install equipment to perform the function of routing calls to the CMRS hub. ExteNet calls this service backhaul. It can provide this service to several CMRS providers at the same time and route the calls to the appropriate provider that would have its own equipment installed to handle its network's calls.[52]

The City disagrees with ExteNet's characterization of its service as backhaul. However, the ALJs are not addressing the parties' arguments regarding how ExteNet's services should be characterized under this Preliminary Order issue. Rather, the ALJs interpret the Commission's request under this issue as a factual inquiry, asking only what facilities will be installed. The issues of how the services should be characterized and how they fit into the regulatory scheme are addressed under Preliminary Order Issue Nos. 2 and 3.[53]

---

[51] What facilities does ExteNet propose to install in the public right of way?

[52] ExteNet Ex. 2 at 7; Tr. at 70.

[53] In its Initial Brief, the City devotes pages of argument under Preliminary Order Issue No. 1 on whether ExteNet's facilities are backhaul and how they should be characterized under the existing statute and regulations. This argument was not persuasive in addressing Preliminary Order Issue No. 1, which asks for a factual discussion of the equipment being installed. The question of what kind of service ExteNet provides is addressed under Preliminary Order Issue No. 2 below.

A. Facilities at the "Node"

The term "node" refers to a collection of several facilities that are located on or adjacent to a pole.[54] The node is the antenna, which is owned by ExteNet, and is placed at a location where there is a "hot spot" of demand from wireless end users and installed with the goal of being as unobtrusive as possible.[55] It is at the node that the equipment that transmits and receives the wireless signal (the Remote Radio Head or RRH) is located.[56] The RRH is owned by a CMRS provider, not ExteNet.[57] There is also coaxial cable that carries the radio frequency signal from the antenna to the RRH.

Also located at the node is the equipment that converts the radio frequency signal to a light signal so that it can be carried over fiber optic cable, and transmits the optical signal over fiber to the CMRS provider's baseband unit at the hub.[58] Parts of the fiber optic cable, which can run long distances, are at the node.[59] The antenna and RRH are connected to a fiber patch panel that is also located at the node.[60] These items of equipment require power from the electric utility that is metered; there also may be batteries at the node to provide backup power in the event of a power outage.[61] ExteNet is a neutral host provider. Its antenna is capable of being used to provide backhaul service for several CMRS providers, each of which would have its own RRH at the node.[62] In summary, ExteNet wants to install an antenna, coaxial cable, RRH (belonging to a CMRS provider), fiber optic cable, and a fiber patch panel together as a "node."

---

[54] Tr. at 75.

[55] ExteNet Ex. 1 at 6-7.

[56] ExteNet Ex. 1 at 5.

[57] Tr. at 84, 88, COH Ex. 17.

[58] ExteNet Ex. 1 at 6, 8; COH Ex. 21.

[59] Tr. at 70, 85.

[60] Tr. at 70.

[61] Tr. at 72-73; ExteNet Ex. 1 at 6, fn. 2.

[62] ExteNet Ex. 2, at 7; Tr. at 70.

B. Facilities Extending from the Node

ExteNet's service is provided using dark fiber cable that extends from the node to the CMRS provider's hub.[63] The fiber is called dark fiber because it is inert until a CMRS provider routes data through the fiber. Specifically, this dark fiber cable connects at the node (attaching to the fiber patch panel at the node) and extends to the fiber patch panel terminating at a piece of equipment called a Baseband Unit or (BBU) located at the CRMS provider's hub.[64] As ExteNet witness Michael Alt testified:

> The BBU routes the voice and data sessions to the Mobile Switching Office. The BBU also controls the operation of the RRHs connected to it. For instance, the BBU directs the RRH to adjust its signal/power strength and works with other BBUs to coordinate hand-offs between different nodes.[65]

From the node, ExteNet provides backhaul using dark fiber cable that extends from the node to the CMRS provider's hub.[66] This fiber connects to the fiber patch panel at the node, and extends from that point to another fiber patch panel at the BBU, which is located at the CMRS provider's hub.[67] The BBU routes the CMRS voice and data traffic to the Mobile Switching Office (MSO) and controls the operation of the RRHs connected to it.[68]

Although ExteNet's fiber facility ends at the BBU at the hub, and ExteNet has no direct interconnection with any telecommunications service provider beyond that point, there is no question that its service is indirectly connected.[69] If it were not, it would be impossible for a Verizon customer who is driving or walking past an ExteNet node to make or receive calls and

---

[63] ExteNet Ex. 1 at 6-7.

[64] Tr. at 77.

[65] ExteNet Ex. 1 at 8.

[66] ExteNet Ex. 1 at 6.

[67] Tr. at 77.

[68] ExteNet Ex. 1 at 8.

[69] ExteNet Ex. 1 at 5, 9; ExteNet Ex. 2 at 7; ExteNet Ex. 4, at 13-14; COH Ex. 34; Tr. at 163-64.

communicate with landline customers of AT&T (or any other telephone company) in Houston, or anywhere else.

C. Ownership of Facilities

ExteNet provides service that is leased to CMRS providers. Certain items of equipment at the node will be owned by the CMRS provider but maintained by ExteNet.[70] ExteNet's facilities are designed to be leased to CMRS carriers. A CMRS carrier would own the RRH, the cable connecting the RRH to the one of the ExteNet-owned fiber patch panels, and the fiber optic cable connecting the fiber patch panel to the CMRS carrier's BBU.[71] ExteNet owns the antenna and the fiber patch panel. Because the entire configuration works together, ExteNet would maintain it.

VI. PRELIMINARY ORDER ISSUE NO. 2[72]

In response to Preliminary Order Issue No. 2, the ALJs find that ExteNet is providing backhaul service for wireless providers. ExteNet, however, is not a wireless provider, nor is it providing CMRS. Although ExteNet, through its fiber, could offer point-to-point service on a wholesale basis in a configuration that does not include a node, it does not currently offer that service.

A. Is ExteNet Providing Backhaul Service?

ExteNet argues that it is providing backhaul service to Verizon, as a neutral host provider – meaning that other carriers can use its service. Staff agrees with ExteNet that the service it provides is backhaul, but Staff argues that ExteNet's definition of backhaul is unreasonable and does not fall within Chapter 283. The City disagrees that ExteNet is providing backhaul because

---

[70] Tr. at 119.

[71] COH Ex. 15.

[72] What services will ExteNet provide through use of these facilities?

the company's services do not meet the definition of interoffice transport. The City offers a number of other arguments, based on the equipment ExteNet uses, the claim that ExteNet is only a contractor to Verizon, and that ExteNet's service is actually CMRS. As explained below, the ALJs find that ExteNet is providing wholesale backhaul service for wireless providers.

1. The Definition of "Backhaul" and Description of ExteNet's Backhaul Service

At the simplest level, the term "backhaul" describes transmission facilities that connect a wireless provider's cell towers to the wireless provider's switch.[73] ExteNet witness Joseph Gillan explained that, "backhaul is commonly understood to refer to the transport of traffic from an antenna site 'back to' a wireless carrier's switching/routing facility," where it is handed off to the CMRS provider for routing.[74] In the case of ExteNet, the company describes its service as unswitched, dedicated point-to-point transport services to its customers, CMRS providers. Specifically, the service transports "data and information from . . . the antenna, all the way back through to the BBU" at the CMRS provider's hub over dark optic fiber.[75]

In his testimony, Mr. Gillan relied on the following definitions of backhaul from Newton's Telecom Dictionary:

> Backhaul: As a verb, backhaul means to carry traffic from the service edge toward the core network; for example, from a cellular tower toward a mobile operator's core network, or from an earth station or cable-landing station to the service provider's point of presence in a carrier hotel or other collocation facility.
>
> Backhaul: As a noun, backhaul is the portion of a telecommunications network that links the service edge to the service provider's core network. An example of backhaul is the portion of a cellular operator's network that connects a cell site

---

[73] *Implementation of HB 1777*, Project No. 20935, Joint Comments on Proposed Rule § 26.465 Counting Access Lines filed by City of Austin, *et al.* (Cities) and Coalition of Cities at 3 (filed Oct. 28, 1999) (PUC Interchange Item 149); and Comments of Texas Municipal League (TML) at 1 (filed Oct. 28, 1999) (PUC Interchange Item 148). ExteNet Ex. 5 at Ex. JPG-3 and JPG-4, respectively.

[74] ExteNet Ex. 5 at 5, 16.

[75] Tr. at 124.

> with the operator's core network. A backhaul network may be made up of single link or multiple intermediate links.[76]

ExteNet explains that in a traditional architecture, backhaul extended from a macro tower, where the RRH and BBU were both located, to the MSO. ExteNet notes that, due to growing bandwidth needs, the traditional architecture of macro towers using high powered antennas is being augmented by a distributed architecture of smaller, lower powered antennas located closer together, using optic fiber. ExteNet contends that its backhaul service performs the same function as traditional backhaul, just through a distributed architecture.[77]

ExteNet describes itself as a neutral-host provider; its backhaul services are wholesale, available for lease to multiple CMRS providers.[78] ExteNet contends that neutral-host providers reduce the need for an individual CMRS provider to install its own network of antennas in every location, thereby improving end-user service, allowing more efficient use of spectrum and increasing efficiencies in the use of public right of way. For instance, Verizon could provide the backhaul function it obtains from ExteNet.[79] This would include design of the facility, selection of equipment, and installation and operation of the facilities.[80] ExteNet contends that whether this is done by Verizon, or obtained on a wholesale basis from an ILEC, CLEC, or ExteNet, the function is the same; when a CMRS provider acquires that function from another telecommunications carrier, the function is obtained as a service, and the service is known as backhaul.[81]

---

[76] ExteNet Ex. 5 at 16, citing Newton's Telecom Dictionary (28th ed. 2014) at 183. The definition of "backhaul" from Newton's Telecom Dictionary; attached to ExteNet Ex. 5, Ex. JPG-2.

[77] Tr. at 206-08.

[78] ExteNet Ex. 1 at 4, 5; ExteNet Ex. 2 at 6-7; Tr. at 70.

[79] Tr. at 125.

[80] As Dr. Cutrer explained, however, in today's environment, wireless carriers are using wholesale carriers to provide backhaul. ExteNet Ex. 2 at 7; ExteNet Ex. 3 at 6.

[81] Tr. at 91.

The ALJs now turn to the arguments of Staff and the City. Staff's argument focuses on the definition of "backhaul" and the regulatory impact of classifying ExteNet's services as backhaul. Among the City's numerous arguments are claims that:

- ExteNet actually provides wireless services;
- ExteNet's services are not interoffice transport and thus not are backhaul; and
- At a technical level, ExteNet is not providing backhaul.

As explained below, the ALJs find that none of these arguments change the answer to the question posed in the Preliminary Order: "What services will ExteNet provide through use of these facilities?" The ALJs find that the answer is ExteNet will provide wholesale backhaul services to wireless providers.

2. The Commission was Aware of Backhaul for Wireless Providers in Project No. 20935

Staff argues that ExteNet's backhaul service is not covered by Chapter 283. Staff acknowledges that ExteNet provides a *type* of backhaul, which Staff defines as "transmission media that does not end at an end-use customer's premises."[82] Staff contends that Chapter 283 only applies to backhaul used for LETS. Because ExteNet provides its backhaul exclusively to CMRS carriers, Staff argues ExteNet's backhaul is not a qualifying service under Chapter 283. Consistent with that argument, Staff also contends that ExteNet's definition of backhaul is unreasonable, because it derives from Newton's Telecom Dictionary and applies explicitly to wireless service, which according to Staff, is excluded from coverage under Chapter 283.[83]

ExteNet responds that the Commission was aware of and considered backhaul for wireless providers when it adopted its rules implementing Chapter 283. ExteNet notes that in Project No. 20935, a full record was developed on the existence of backhaul and whether it

[82] *See* Tr. at 184-85, 374.

[83] *See* ExteNet's Initial Brief at 5; ExteNet Ex. 5 at Ex. JPG-2.

should be counted as an access line to determine a city's compensation. ExteNet points out that, during the development of the Commission's rules, cities, industry, and the Commission clearly contemplated backhaul provided to CMRS carriers. For instance, one of the questions Staff posed was how transmission facilities that served *wireless providers* should be treated.[84] Responsive comments filed by the Texas Municipal League (TML) and participating cities specifically used the term "backhaul" to describe transmission facilities that connected *a wireless provider's* cell towers to the wireless provider's switch.[85]

ExteNet points out that, despite the fact that the Commission considered multiple types of backhaul in Project No. 20935, its implementing rules do not discuss types of backhaul or whether some types should be counted under Chapter 283. The rules do not even address the very type of backhaul TML and the cities were concerned with – backhaul to wireless providers. ExteNet notes that the question the Commission weighed at that time was whether to count backhaul as an access line. Because backhaul is generally excluded from the definition of an "access line," ExteNet argues the logical conclusion is that backhaul to CMRS providers is also excluded from counting as an access line.

ExteNet notes that Staff's argument that the Commission only contemplated "backhaul facilities used in providing LETS" also lacks critical detail.[86] ExteNet points out that Staff did not address the filed comments or the workshop transcript from Project No. 20935 discussed above. Nor did Staff explain what the LETS-only backhaul facilities would be, how backhaul is

---

[84] Project No. 20935, *Implementation of HB 1777*, Proposed New Rule § 26.465, Preamble at 3 (Sept. 24, 1999) (PUC Interchange Item 127), where the Commission specifically asked for comments regarding the following question:

> (2) Whether connections (transmission facilities) to wireless providers which are used solely for the purposes of providing wireless telecommunications services have to be counted as access lines and, if not, whether an exemption creates implications for Internet service providers and other providers of voice or data transmission whose access lines are counted . . .

[85] Project No. 20935, *Implementation of HB 1777*, Joint Comments on Proposed Rule § 26.465 Counting Access Lines filed by City of Austin, *et al.* (cities) and Coalition of Cities at 3 (filed Oct. 28, 1999) (PUC Interchange Item 149); and Comments of TML at 1 (filed Oct. 28, 1999) (PUC Interchange Item 148). The Cities Comments and TML Comments are attached to ExteNet Ex. 5, at Ex. JPG-3 and JPG-4, respectively.

[86] Staff Initial Brief at 8.

used to provide LETS, and how such facilities differ from ExteNet's backhaul facilities. ExteNet asserts that Staff's argument presupposes that backhaul used for LETS implies an end-to-end connection, in which LETS-only backhaul connects directly to a single local telephone line, much less intermediate or final connections or routing to or through another type of network, such as a wireless network.[87]

Finally, ExteNet explains that its backhaul performs the same function that was discussed in Project No. 20935. ExteNet notes that its architecture is not materially different from any other backhaul provider of dark fiber to a CMRS provider. Mr. Gillan testified that:

> If there is any difference between ExteNet's backhaul architecture and that of a more traditional provider it is that ExteNet's facilities receive wireless traffic *on* the antenna instead of *at* the antenna. But this distinction is immaterial to basic functionality of connecting Verizon Wireless' telecommunications equipment so that its traffic (voice and data) can be aggregated and "hauled back" (or backhauled) to its facilities at the hub.[88]

The ALJs find that Staff's argument that backhaul is limited to LETS is too narrow. If Staff's argument were correct, and the Commission decided only backhaul used for LETS would be excluded from the access line count, then all other types of backhaul would be counted as an access line or removed from Chapter 283's coverage altogether. ExteNet established, however, that the Commission and the parties to Project No. 20935 were aware of and considered backhaul for wireless carriers. Notably, despite backhaul for wireless carriers being discussed during Project No. 20935, the Commission did not exclude wireless backhaul from any of the implementing rules, nor did it distinguish between different types of backhaul.

As a result, the ALJs consider "backhaul" to be an industry term, which focuses on the function of the facilities at issue. As pointed out by Staff, neither Chapter 283 nor the

---

[87] Staff Initial Brief at 8 ("without this provision, the back-haul provider and the retail provider would both have to pay 'access line fees' on the same access line").

[88] ExteNet Ex. 4 at 9.

Commission's implementing rules define "backhaul facilities."[89] The Commission's implementing rules only use the term "backhaul facilities" twice, but that term is left undefined.[90] Because there is no legal or regulatory definition of backhaul, it is entirely appropriate for ExteNet (and any other party for that matter) to refer to an industry-specific definition as a starting point. The ALJs find that ExteNet's definition of backhaul in the context of wireless service does not somehow disqualify ExteNet's type of backhaul from coverage under Chapter 283. In fact, to so find would run counter to the stated policies in Chapter 283, including the lowering of barriers to market entry, by attempting to apply narrowly-tailored distinctions instead of focusing on a technology's function.

The ALJs note ExteNet's backhaul uses technological innovations in the provision of its services. Yet, as ExteNet established, the transport function it provides to its customers is still backhaul. As Mr. Alt explained:

> The only thing new about our backhaul network is that it is designed to support a more *modern* CMRS architecture that relies on multiple, geographically dispersed, smaller antennas, rather than relatively few, but much larger, installations. In the traditional architecture, the CMRS carriers shared towers and backhaul providers (such as local and long distance carriers) built fiber to these locations. The ExteNet network adds the opportunity to share the antenna: but each of our customers is responsible for modulating its own licensed spectrum to/from that antenna, just as each carrier that leases dark fiber must modulate the light frequencies on that dark fiber. Our role is the same. Our facilities aggregate and transport the CMRS carrier's traffic for backhaul to its network for disposition. Our services in Houston—essentially dark fiber and a dark antenna—are simply a modern version of an architecture that has been in place for decades.[91]

The ALJs find that, during Project No. 20935, the Commission was aware of the use of backhaul by wireless providers and yet did not distinguish it as a separate type of backhaul, to be excluded from coverage under Chapter 283.

---

[89] *See generally* Tex. Local Gov't Code Ch. 283; 16 Tex. Admin. Code § 26.465(f)(2)-(3); *See* Tr. at 179, 180, 373.

[90] 16 Tex. Admin. Code § 26.465(f)(2)-(3).

[91] ExteNet Ex. 1 at 9 (footnote omitted) (emphasis in original).

3. Preliminary Order Issue No. 2 Does Not Inquire as to the Impact of Classifying ExteNet's Services as Backhaul

Staff also argues that ExteNet's definition of backhaul is unreasonable because of the regulatory consequences that result from classifying those services as backhaul. Staff contends that, if ExteNet's service is considered backhaul, the company would not have to compensate the City for installing its facilities in the City's right of way. And, because Verizon is not covered by Chapter 283, it does not pay the City an allocation of the base amount. As a result, Staff argues the City would be uncompensated for ExteNet's use of its right of way.[92] Staff contends that the Commission never contemplated such a result when it developed rules to implement Chapter 283.

Staff's argument focuses on the impact of describing ExteNet's services as backhaul. The ALJs find that this argument exceeds the simple question presented by Preliminary Order Issue No. 2. Issue No. 2 only asks: "What services will ExteNet provide through use of these facilities?"[93] As explained above, while Staff raised valid questions as to how best to describe ExteNet's services, the ALJs find that ExteNet is providing backhaul to wireless providers.

The ALJs recognize that Staff is interpreting this question through the lens of Chapter 283 and the Commission's implementing rules. However, the issue Staff addresses is covered elsewhere in this PFD, including under Preliminary Order Issue No. 3. Furthermore, if Staff is taking into account the regulatory effect of classifying ExteNet's services as backhaul, then it should be pointed out that Verizon is compensating the City for access to its right of way. As explained above, under Chapter 283 and the Commission's rules, backhaul facilities are not counted for purposes of calculating the compensation paid to a municipality, because doing so

---

[92] 16 Tex. Admin. Code § 26.461(c)(1)(B).

[93] Preliminary Order at 3.

would potentially lead to the double-counting of access lines for a single service.[94] Although Verizon is not covered by Chapter 283, the situation is somewhat analogous; the City is being compensated for Verizon's use of its right of way for the provision of a single service.

4. ExteNet's Service is Backhaul, Not Interoffice Transport

The City claims that ExteNet's service is not backhaul because it does not meet the definition of interoffice transport. Staff and ExteNet disagree. As explained below, the ALJs find that interoffice transport and backhaul are not the same and that ExteNet is providing backhaul, not interoffice transport.

The City defines interoffice transport as "transmission facilities between two central offices."[95] Because ExteNet does not have central offices, the City contends ExteNet cannot meet the definition of interoffice transport. This is significant because, according to the City, the Commission's *Access Line Counting Rule Order* equates backhaul and interoffice transport.[96] The City concludes that if ExteNet's service is not interoffice transport, then it is not backhaul.

The City also argues that, because ExteNet's specific equipment includes antenna, conversion equipment, and connective fiber optic cable, the company's service is a wireless network. Because the Commission found that lines to wireless providers are not considered interoffice transport, the City argues that ExteNet's wireless-related services cannot be backhaul.[97]

---

[94] Under the Commission's rules, "the definition of 'access lines' may not be construed to include interoffice transport or other transmission media that do not terminate at an end-use customer's premises or to permit duplicate or multiple assessment of access line rates on the provision of a single service." 16 Tex. Admin. Code § 26.461(c)(1)(B). *See also* Tex. Local Gov't Code § 283.002(1)(B).

[95] COH Ex. 3 at 33-35.

[96] *Access Line Counting Rule Order* at 51-52. It was the Commission's "intention ... to exclude back-haul facilities, *as these would constitute interoffice transport.* ... the commission ... revised subsection (f)(2) by *replacing the term 'transmission facilities'* with the term *'back-haul' facilities* to provide clarity."

[97] *Access Line Counting Rule Order* at 12-14. "The commission also clarifies that it does not consider lines to wireless providers to be interoffice transport."

ExteNet does not disagree with the City's definition of interoffice transport as "transmission facilities between two central offices."[98] ExteNet also acknowledges City witness Steven E. Turner's explanation that interoffice transport "provides the connectivity between central offices – hence, the use of the term 'interoffice transport.'"[99] ExteNet argues, however, that despite Mr. Turner's correct definition of interoffice transport, at times the City incorrectly defines interoffice transport in its briefing. For instance, the City contends that interoffice transport includes facilities between a cell site and a CMRS provider's MSO. ExteNet disagrees, however, asserting that a CMRS provider's cell site, hub, and MSO are not central offices.

ExteNet also argues that interoffice transport is irrelevant to this case because it is distinct from backhaul. ExteNet disagrees with the City's contention that backhaul is a subset of interoffice transport, arguing that the City provided no support for this contention. Staff also takes issue with the City's contention and notes that, in the two references to backhaul facilities in the Commission's rules, backhaul and interoffice transport are described as separate services, neither of which should be counted as access lines:

16 Texas Administrative Code § 26.465(f)(2):

> Lines used by providers who are not end-use customers such as a CTP, wireless provider, or IXC[100] *for interoffice transport, or back-haul facilities* used to connect such providers' telecommunications equipment.

16 Texas Administrative Code § 26.465(f)(3):

> Lines used by a CTP's wireless and IXC affiliates who are not end-use customers, *for interoffice transport, or back-haul facilities* used to connect such affiliates' telecommunications equipment.

Staff points out that, on cross examination, the City's expert, Mr. Turner, agreed that "back-haul facilities" written in this context is "its own separate clause" in the sentence, distinct from the

---

[98] COH Ex. 3 at 33-34.

[99] COH Ex. 4 at 3 (emphasis in original).

[100] Interexchange carrier.

term "interoffice transport."[101] The ALJs agree with Staff that, in the Commission's rules, interoffice transport and backhaul are treated as separate services. The word "or" between the two clauses has meaning.[102] The ALJs find that whether ExteNet's service is considered interoffice transport is not determinative of whether it is backhaul.

The City also argues that because ExteNet is essentially a wireless provider, its services cannot be classified as backhaul. The City focuses on the Commission's conclusion in the *Access Line Counting Rule Order* that "the wireless network falls outside the definition of access lines."[103] The Commission then stated that the definition "excludes lines terminating to a wireless provider" from the access line count, and "clarifies that it does not consider lines to wireless providers to be interoffice transport."[104] In response, ExteNet flatly denies that it is a wireless provider. As explained below, the ALJs agree that ExteNet is not a wireless provider. And as explained above, interoffice transport and backhaul are separate services; ExteNet is providing backhaul, not interoffice transport.

5. The Function of ExteNet's Equipment is to Provide Backhaul Service

Next, the City engages in a granular focus on ExteNet's equipment to argue that ExteNet's service is not backhaul due to its termination point. Specifically, the City contends that ExteNet's fiber connects to a fiber patch panel, not to a wireless provider. As a result, according to the City, ExteNet's service is not backhaul.[105] ExteNet responds that, in the context of Chapter 283, the term "termination" does not refer to an equipment termination point, but rather where the line terminates at the customer. ExteNet also argues that neither Chapter 283 nor the Commission's rules contemplate this level of technical detail.[106]

---

[101] Tr. at 373.

[102] 16 Tex. Admin. Code § 26.465(f)(2), (f)(3).

[103] City Initial Brief at 28.

[104] *Access Line Counting Rule Order* at 14.

[105] City Initial Brief at 28.

[106] 16 Tex. Admin. Code § 26.465(f).

The ALJs agree with ExteNet that the City's focus on ExteNet's equipment misses the proper aim of the inquiry, which is the function of ExteNet's facilities. For instance, in Project No. 26412, the Commission revised the definition of "access line" in the context of what constitutes a "switched transmission path." In revising the definition, the Commission stated:

> The commission's amendment to the definition of transmission path does not alter the requirement that an access line must be switched, but rather removes the limitation that the switch used must be a circuit-switch. In practice, a switch is a relatively simple concept. A switch creates a pathway between end-users. This pathway is not necessarily a dedicated circuit, but routes information between these end-users. *Functionality, rather than technology, is the threshold.*[107]

Furthermore, to narrowly focus on a new technology's equipment instead of its function is likely to distinguish and exclude it from coverage under Chapter 283. Such a result would undermine the law's stated purposes of removing barriers to entry and encouraging competition.[108] As Mr. Gillan noted, 16 Texas Administrative Code § 26.465(f)(2) is:

> [A]rchitecture and technology neutral, simply recognizing backhaul as "facilities used to connect such [CTP, wireless, or IXC] providers' telecommunications equipment." This approach recognizes the importance of wholesale carrier's carriers to the provision of end-user services without imposing any particular architecture or technology. This is the appropriate policy to foster innovation and technological change and, at the very least, should not be abandoned without a comprehensive rulemaking.[109]

6. The ExteNet/Verizon Contract Contemplates Backhaul Service

The City also argues that the service ExteNet provides is inconsistent with the definition of backhaul and its contract with Verizon.[110] ExteNet responds that the ExteNet/Verizon Contract is a multi-state agreement that addresses various configurations depending on the

---

[107] *Rulemaking to Amend P.U.C. Substantive Rule 26.465*, Project No. 26412, Order Adopting Amendments to § 26.465 as Approved at the February 15, 2003 Open Meeting, at 12 (emphasis added).

[108] Tex. Local Gov't Code § 283.001(a)(1)-(4).

[109] ExteNet Ex. 4 at 15-16.

[110] City Initial Brief at 29-30; COH Ex. 29, HIGHLY SENSITIVE PROTECTED Portions of Licensee Contract #121454 Amended and Restated Master Distributed Network License Agreement Between Cellco Partnership d/b/a Verizon Wireless and ExteNet Systems, Inc. (ExteNet/Verizon Contract).

network and Verizon's orders.[111] ExteNet points out that there is no dispute Verizon owns the RHH and BBU, and ExteNet owns and operates all of the remaining equipment in the node and dark fiber.[112] ExteNet also argues that the definitions cited by the City are generally vague and reference equipment that could be owned by either ExteNet or Verizon. Most important, however, ExteNet witness David Cutrer, Ph.D., testified that the service described in the contract has the same function as the RF Transport his former company provided – and that service is backhaul.[113]

7. The City's Position is Inconsistent with the Intent of Chapter 283

Finally, Staff is concerned that the City's position is so broad that, if adopted, all CTPs providing backhaul would no longer be covered under Chapter 283. Currently, many wholesale providers lease backhaul facilities to retail LETS providers under Chapter 283.[114] The City argues that backhaul service is not included under Chapter 283 because a backhaul provider has no end-use retail customers.[115] If the City's position is adopted, then Staff anticipates CTPs providing backhaul to LETS providers could lose Chapter 283 protection and have to reestablish franchise agreements with the City for right of way access.[116]

The ALJs have expressly stated that the proposed outcome of this case is limited to its facts. As a result, Staff's concern may be unwarranted. Staff's concern does, however, highlight the ALJs' recommendation in this case. This docket presents a problem where technology appears to have outpaced the regulatory environment. The legislature clearly foresaw this situation in drafting Chapter 283 as evidenced by the provision's explicit policy goals and adjustment mechanisms. Yet, even if ExteNet's technology is a misfit with Chapter 283, it is

---

[111] COH Ex. 29.

[112] COH Ex. 15; ExteNet Ex. 1 at 7-8; ExteNet Ex. 4 at 8-9.

[113] ExteNet Ex. 2 at 6.

[114] *See* Tr. at 377-79.

[115] COH Ex. 3 at 24 (quoting 16 Texas Administrative Code § 26.465(f)(1), "all-lines that do not terminate at an end-use customer's premises" are "lines not to be counted").

[116] *See* Comcast's amicus brief at 1-3 (Nov. 16, 2016).

more consistent with the legislature's intent to find that ExteNet's backhaul services are covered than to exclude them. In contrast, the City's position is at odds with Chapter 283's goal of flexibility for new technologies by removing barriers for new market entrants and encouraging competition.[117]

B. Is ExteNet Providing Commercial Mobile Radio Service?

The City argues that ExteNet is providing nothing more than CMRS. Both ExteNet and Staff disagree. As explained below, the ALJs find that ExteNet is not providing CMRS, although it does serve as a wholesale contractor for CMRS providers.

The City argues that ExteNet's service is essentially an adjunct to CMRS. The City claims the only function of ExteNet's facilities is to provide CMRS, or its equivalent. The City asserts that ExteNet's facilities perform the same functions that Verizon can perform for itself.[118] Thus, according to the City, ExteNet is providing an essential component of CMRS and nothing else.[119] The City points out that in the *Base Amount Order*, the Commission determined wireless network service provided by a CMRS provider is outside the framework of Chapter 283.[120] Such services include cable services and long-distance services. Because wireless service is outside the framework of Chapter 283, to obtain access to the City's right of way, ExteNet needs to make arrangements outside of Chapter 283.

ExteNet and Staff disagree. ExteNet first notes that two of its witnesses, with industry experience in this subject area, testified that ExteNet is not providing CMRS. ExteNet points out that CMRS is defined by federal law, which requires a CMRS provider to hold a right to use specific radio spectrum under license from the Federal Communications Commission (FCC) to provide cellular services and wireless broadband. On behalf of ExteNet, Mr. Alt testified that "to

---

[117] Tex. Local Gov't Code § 283.001(a).

[118] ExteNet Complaint at 12-13; COH Ex. 3 at 28.

[119] Tr. at 91, 99-105.

[120] COH Ex. 3 at 25.

facilitate a wireless service, you have to be transmitting and receiving over some carrier wave[121] which is in spectrum. The backhaul doesn't have any spectrum allocation to it."[122] Mr. Alt also explained:

> [ExteNet] does not own or control (or otherwise have the right to use) the spectrum necessary to provide CMRS services or any other type of wireless service. ExteNet's customers have been awarded or otherwise acquired spectrum licenses from the [FCC] that are necessary to be able to provide CMRS services. My former employer Sprint, and Verizon Wireless, AT&T Wireless and T-Mobile are companies people commonly think of as wireless carriers. They are CMRS carriers that hold licensed spectrum.[123]

ExteNet also argues that a telecommunications service provider is not a CMRS provider unless it is providing a mobile service and there is a mobile station on at least one end of the communication. ExteNet notes that it does not provide a "mobile service" as defined by statute, nor is there a "mobile station" on one end of the communications service it provides. Section 153(33) of the Federal Communications Act of 1934 (the Act)[124] defines a "mobile service" as:

> *a radio communication service* carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes (A) both one-way and two-way radio communication services, (B) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations . . . for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation, and (C) any service for which a license is required in a personal communications service established pursuant to the proceeding entitled "Amendment to the Commission's Rules to Establish New Personal Communications Services" (GEN Docket No. 90–314; ET Docket No. 92–100), or any successor proceeding.

---

[121] As Mr. Alt explained, "Carrier wave would be a frequency, a specific frequency that would be the center of the modulated signal. So, for example, 1950 megahertz would be a carrier wave frequency." It is not the same as "wireless." Again, as Mr. Alt explained, "a RF frequency or a RF signal can be carried by any medium, whether it be cabled or whether it be wireless." Tr. at 126.

[122] Tr. at 124.

[123] ExteNet Ex. 1 at 9-10. ExteNet notes that Mr. Alt's professional experience includes working for Sprint, a CMRS provider. ExteNet Ex. 1 at 3.

[124] The Communications Act of 1934 as amended (the Act) (emphasis added).

The Act defines a "mobile station" in Section 153(34) as "a radio-communication station capable of being moved and which ordinarily does move." On behalf of ExteNet, Dr. Cutrer explained that "cellphones, smartphones, and other wireless devices that people carry with them and use to make calls and access the Internet are mobile stations."[125]

Furthermore, with respect to the definition of a "mobile service" in Section 153(33), Dr. Cutrer stressed that CMRS is a "radio communication service":

> The facilities that ExteNet is planning to deploy in the Houston right-of-way are not capable of independently providing a radio communication service. Its facilities are inert; they neither send nor receive any radio communications until activated *by ExteNet's CMRS carrier customer*. No signals are radiated from the antenna, no signals are received at the antenna, and no communications occur until activated by the CMRS carrier. The sending and receiving of signals is under the sole control of the CMRS carrier utilizing its FCC licensed spectrum.[126]

Dr. Cutrer also testified that no radio license is required to install the antenna or any other equipment to be located at ExteNet's nodes to provide the company's backhaul service.[127]

Finally, ExteNet points out that Section 332(d) of the Act defines a "commercial mobile service" as:

> [A]ny mobile service (as defined in [the Act]) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the [FCC].[128]

Although ExteNet's facilities are undoubtedly used in the provision of a wireless mobile service,[129] ExteNet's services are provided exclusively on a wholesale basis, meaning that it is

---

[125] ExteNet Ex. 2 at 9.

[126] ExteNet Ex. 2 at 9 (emphasis added).

[127] ExteNet Ex. 2 at 12.

[128] *See also* 47 C.F.R. § 20.3.

[129] Mobile services include a scenario in which radio communications are carried on between mobile receivers, such as cell phones and fixed receivers, such as small cell antennas. 47 C.F.R. § 20.3.

not available to the public or to such classes of eligible users as to be effectively available to a substantial portion of the public.[130] Staff agrees with ExteNet's position to the limited extent that ExteNet's service is a wholesale service that is not generally available to the public.

The ALJs agree with ExteNet and Staff that the company does not offer CMRS. As demonstrated by ExteNet, it lacks numerous key elements to be legally classified as a provider of wireless services. ExteNet:

- Lacks a right to use specific radio spectrum under license from the FCC;
- Lacks any spectrum allocation to its backhaul service;
- Is not capable of independently providing a radio communication service – the company's facilities are inert;
- Does not need a radio license to install the company's backhaul service;
- Does not provide a "mobile service" as defined by statute;
- Lacks a "mobile station" on one end of its backhaul service;
- Does not offer CMRS to end user customers; and
- Provides its service exclusively on a wholesale basis, meaning that it is not available to the public.[131]

The ALJs, however, acknowledge the City's argument that ExteNet installs components whose primary function is to provide CMRS or its equivalent. The City also makes a valid point that ExteNet is a contractor installing and maintaining facilities on behalf of Verizon and potentially other CMRS providers. Despite these accurate characterizations of ExteNet's services, however, the ALJs disagree with the City's ultimate conclusion that ExteNet should be excluded from coverage under Chapter 283.

---

[130] ExteNet Ex. 2 at 4.

[131] Tr. at 118; COH Ex. 26.

The City's arguments rely on two critical characterizations of ExteNet's services with which the ALJs disagree. First, the City predicates its arguments on the claim that ExteNet is not a CTP for purposes of Chapter 283.[132] As explained herein, the ALJs find that ExteNet is a CTP. Second, the City claims that ExteNet is not providing backhaul. As explained above, the ALJs find that ExteNet is providing backhaul. Thus, although ExteNet's primary role is that of a wholesale contractor for facilities used by wireless providers, it should not be excluded from coverage under Chapter 283 because it is also a CTP that provides backhaul, albeit for retail wireless providers.

C. Is ExteNet Providing Other Services Through its Facilities?

ExteNet explains that although it offers a backhaul service to CMRS providers, the fiber it installs is capable of other uses. For example, ExteNet could offer point-to-point service on a wholesale basis in a configuration that did not include a node.[133] ExteNet also reiterates that the voice calls and data carried on the company's backhaul service are not just wireless-to-wireless communications. Verizon's end-user customers make voice calls to end users at businesses, stores, government agencies, homes, and other locations served by landlines and where a landline, not a cellphone, is picked up to answer a call. ExteNet points out that these landline end users also make calls to wireless end users.[134] Furthermore, the traffic being carried over ExteNet's backhaul service includes both local and long distance calls, as well as texts and data. ExteNet does not offer services to end user customers,[135] but its backhaul service is used to transport all of the types of telecommunications traffic sent to or received by Verizon's end user customers.

---

[132] City Initial Brief at 36.

[133] Tr. at 122.

[134] Tr. at 200-02.

[135] Tr. at 118; COH Ex. 26.

The City argues that ExteNet does nothing more than install facilities a CMRS provider needs for an expanded geographic footprint of its wireless services. The City also notes that, according to the testimony of Mr. Alt, Ms. Barlow, and Mr. Gillan, ExteNet does not provide:

- LETS;
- Non-switched private-line service;[136]
- Non-switched telecommunications service;
- Central-Office-based PBX service;[137]
- Customer-lit dark fiber (Dark Fiber Service); and [138]
- "Voice service" provided over Internet Protocols (VoIP).[139]

Most importantly, the City argues that because any qualified contractor can install ExteNet's facilities, the company does not provide a telecommunications service, a requisite for coverage under Chapter 283.[140] Finally, the City reiterates its argument that ExteNet does not provide interoffice transport or backhaul.[141]

As for the latter contentions, as the ALJs explained above, ExteNet is providing backhaul service to CMRS providers; the facilities it installs at its nodes and the fiber it installs under the street or aerially on utility poles are used for backhaul service.[142] Whether that service is also interoffice transport is irrelevant.

---

[136] Tex. Local Gov't. Code § 283.002(1)(A) "access line" (ii) (non-switched private line data, point-to-point service); 16 Tex. Admin. Code § 26.465(d)(2) (non-switched private line data, point to point service).

[137] Tex. Local Gov't. Code § 283.002(1)(A) "access line" (iii) [PBX type service]; 16 Tex. Admin. Code § 26.465(d)(3) (PBX type service).

[138] 16 Tex. Admin. Code § 26.465(d)(2)(E) (customer lit dark fiber), (e)(6).

[139] Tex. Local Gov't. Code § 283.002(7) ("voice service" definition). *See also* 16 Tex. Admin. Code § 26.465(c)(E).

[140] COH Ex. 3 at 34.

[141] COH Ex. 25; Tr. at 163-64.

[142] Tr. at 122.

As for the City's contention that ExteNet is not providing a telecommunications service, the company strongly disagrees with this assertion. ExteNet points out that the City's argument relies on the Commission's summary report for ExteNet, which contains a list of specific types of telecommunications service and states whether ExteNet offers them.[143] With respect to "OPT SVCS," the notation provided was "Bus," meaning optical services provided to business customers. ExteNet argues the City provides no support for its conclusion that the provision of optical services to business customers is not a telecommunications service. Instead, ExteNet notes that Question 4 on the Commission's mandatory form applicants for certification must complete requires an applicant to describe the *telecommunications services* to be provided, and specifically identifies "Optical Services" as a telecommunications service, asking whether it will be provided to Business or Residential customers:[144]

> 4. (a) Provide a detailed description of the telecommunications services to be provided.
>
> (b) Indicate with a yes or no response for each item below, whether the Applicant will be providing *the following telecommunications services* and whether the service will be for business or residential service:

	Business	Residential
_____POTS (Plain Old Telephone Service)	_____	_____
_____ADSL	_____	_____
_____ISDN	_____	_____
_____HDSL	_____	_____
_____SDSL	_____	_____
_____RADSL	_____	_____
_____VDSL	_____	_____
_____*Optical Services*	_____	_____
_____T1-Private Line	_____	_____
_____Switch 56 KBPS (KiloBits Per Second)	_____	_____
_____Frame Relay	_____	_____

[143] COH Ex. 25.

[144] *See* Application for Certification, Re-Qualification, or Amendment to a Service Provider Certificate of Operating Authority or a Certificate of Operating Authority at 6 (Q. 4), found at: www.puc.texas.gov/industry/communications/forms/clec/clecapp.pdf (emphasis added).

The ALJs agree with ExteNet that its backhaul service is an optical service provided over fiber optic cable. Specifically, as shown by ExteNet immediately above, the company's SPCOA application, which the Commission approved, states that ExteNet is providing business Optical Services.[145] As a result, the ALJs conclude that ExteNet provides a telecommunications service.

The ALJs conclude that, although ExteNet offers a backhaul service to CMRS providers, the fiber it installs is capable of other uses. ExteNet could, for example, offer point-to-point service on a wholesale basis in a configuration that does not include a node.

VII. PRELIMINARY ORDER ISSUE NO. 3[146]

A. Chapter 283 Applies to ExteNet

As explained throughout this PFD, the ALJs recommend that the answer to Preliminary Order Issue No. 3 is yes; Chapter 283 applies to ExteNet. Most of the analytic framework in response to Preliminary Order Issue No. 3 has already been addressed in this PFD. As a result, Preliminary Order Issue No. 3, which is composed of two questions, is answered by the ALJs in summary analysis. The parties' remaining arguments are addressed below.

The first question in Preliminary Order Issue No. 3 is:

> Does Texas Local Government Code chapter 283 apply to an entity that is a certificated telecommunications provider when it is providing services that do not require the entity to have a certificate under the Public Utility Regulatory Act (PURA)?

---

[145] COH Ex. 17 (Official Notice), *Application of ExteNet Systems, Inc. for a Service Provider Certificate of Operating Authority*, Docket No. 33365 at 9.

[146] Does Texas Local Government Code chapter 283 apply to an entity that is a certificated telecommunications provider when it is providing services that do not require the entity to have a certificate under the Public Utility Regulatory Act (PURA)? Specifically, does chapter 283 apply where a certificated telecommunications provider has installed, or proposes to install, in the public right of way a wireless distributed antenna system, including fiber optic cables and an antenna?

The answer is yes. The primary issue in this case is whether Chapter 283 applies to ExteNet, which is a CTP, that does provide LETS, and the company's backhaul service is not dedicated to LETS. The ALJs find that ExteNet should be covered by Chapter 283 because it is a CTP providing a telecommunications service in the form of backhaul for CMRS providers.

Chapter 283 expresses no distinction between a CTP that provides LETS and one that does not. The language of Chapter 283 is definite. The chapter defines a CTP as:

> [A] person who has been issued a . . . service provider certificate of operating authority by the commission to *offer* local exchange telephone service . . . .[147]

ExteNet holds an SPCOA to *offer* LETS issued by the Commission and is thus a CTP under Chapter 283.[148] Chapter 283's application provision is also short, straight-forward, and contains no caveats:

> Application. This chapter applies only to municipal regulations and fees imposed on and collected from *certificated telecommunications providers*.[149]

Consistent with Chapter 283, the ALJs have found that H.B. 1777 was intended to apply to all CTPs, regardless of whether those CTPs provide telecommunications services over landlines or connections that initiate or terminate at a wireless network. As explained by Ms. Barlow, an attorney who actively participated in developing H.B. 1777:

> H.B. 1777 was intended to apply to *all* CTPs, not just those CTPs that provided telecommunications services over landlines. H.B. 1777's compensation scheme is tied to the provision of landline service, but H.B. 1777 is not limited to CTPs that provide only landline-based telecommunications services. During the H.B. 1777 negotiations, ILEC and municipal representatives were very firm on this point: H.B. 1777 would apply to *all* CTPs. There were no exemptions or exclusions. Teligent is a prime example of this fact. Teligent was a CTP that served its customers using wireless technology. Teligent did not provide any landline

---

[147] Tex. Local Gov't Code § 283.002(2) (emphasis added).

[148] ExteNet holds SPCOA No. 60769 granted by the Commission in 2006 in Docket No. 33365. ExteNet is certificated to offer LETS as evidenced by the Notice of Approval.

[149] Tex. Local Gov't Code § 283.004 (emphasis added).

> telecommunications services, but Teligent nonetheless was subject to the provisions of H.B. 1777.[150]

The statute's plain language does not differentiate between classes of CTPs and does not create an exception for an entity that is a CTP that does not provide LETS.[151]

The ALJs also find the coverage of ExteNet under Chapter 283 to be consistent with the legislature's goals as expressed in Chapter 283.

The second question in Preliminary Order Issue No. 3 is:

> Specifically, does chapter 283 apply where a certificated telecommunications provider has installed, or proposes to install, in the public right of way a wireless distributed antenna system, including fiber optic cables and an antenna?

The answer is yes. The second question focuses on the wireless nature of ExteNet's service and the specific equipment it intends to install in the City's right of way. As the ALJs explained above, ExteNet is providing backhaul service. In developing its implementing rules, the Commission was aware that backhaul could include backhaul used by wireless providers. Despite this knowledge, the Commission decided not to count backhaul as an access line and did not distinguish among types of backhaul facilities.[152]

The second question also inquires as to the specific equipment ExteNet intends to install in the City's right of way. In this case, however, the ALJs do not consider the equipment itself to be a dispositive factor, so long as ExteNet is providing backhaul. As Mr. Gillan testified, the Commission's implementing rules are:

> [A]rchitecture and technology neutral, simply recognizing backhaul as "facilities used to connect [CTP, wireless or IXC] providers' telecommunications equipment." This approach recognizes the importance of wholesale carriers to the

---

[150] ExteNet Ex. 6 at 13 (emphasis in original). *See also* Tr. at 253.

[151] *See generally* PFD Section IV.A.1, above, for further discussion.

[152] 16 Tex. Admin. Code § 26.465(f)(2), (3).

> provision of end-user services without imposing any particular architecture or technology. This is the appropriate policy to foster innovation and technological change and, at the very least, should not be abandoned without a comprehensive rulemaking.[153]

The ALJs conclude that ExteNet is providing backhaul, which is covered by Chapter 283.

B. Parties' Arguments

Most of the analytic framework and argument underlying the ALJs' conclusions above have already been discussed and analyzed in this PFD. The ALJs will not revisit those arguments and only address the parties' remaining arguments unique to Issue No. 3.

1. Regardless of its Status as a Contractor to CMRS Providers, ExteNet's is still a CTP

The City argues that ExteNet is not entitled to coverage under Chapter 283, because the company is nothing more than a contractor for Verizon, installing equipment that Verizon could install on its own. To the ALJs, this argument implicitly recognizes that the specific equipment installed by ExteNet is irrelevant. As with all backhaul, ExteNet's equipment is something the retail provider will ultimately use in the provision of its service – and could be installed by the retail provider. Other than using modern technology, nothing about ExteNet's equipment stands out from other forms of backhaul; as Dr. Cutrer explained, ExteNet's equipment is inert until activated by a provider.[154] And the only differences between ExteNet's and earlier technology, are that ExteNet uses a network of smaller antennas as opposed to a single large antenna, and its facilities receive wireless traffic *on* the antenna instead of *at* the antenna.[155] ExteNet's facilities meet the definition of backhaul, which is covered by Chapter 283.

---

[153] ExteNet Ex. 4 at 15-16. *See also* ExteNet Ex. 5 at 16, Ex. JPG-2 at 183; 16 Tex. Admin. Code § 26.465(f)(2).

[154] ExteNet Ex. 2 at 9.

[155] ExteNet Ex. 4 at 9.

2. ExteNet is a CTP Despite the Fact that it Does Not Provide LETS

Staff presents two basic arguments that ExteNet's backhaul is not covered by Chapter 283: the legislature intended Chapter 283 to apply only to entities that actually provide LETS; and the Commission's rules exclude CTPs that neither report nor pay access line fees to cities. Based on ExteNet's arguments the ALJs disagree with Staff and find that ExteNet is a covered CTP.

Staff asserts that the primary purpose of Chapter 283 is to facilitate competition between wholesale and retail providers of LETS. In support of this argument, Staff cites to Section 283.001(c).[156] ExteNet notes, however, that this section does not limit the provision's application to providers of LETS. Instead, it speaks of CTPs and telecommunications providers. The ALJs agree with ExteNet; LETS is not mentioned in this provision.

In addition to Chapter 283's applicability provision, which sets no limitations on the chapter's application to a CTP,[157] ExteNet also notes that 16 Texas Administrative Code § 26.467(b) states that "[t]he provisions of this section apply to certificated telecommunications providers (CTPs) and municipalities in the State of Texas, unless otherwise specified in this section." And subsection (k) states that "[t]he requirements listed in this subsection shall apply to all CTPs in the State of Texas, except those exempted pursuant to § 26.465 of this title." ExteNet points out that the exemption only applies to a CTP that does not terminate a franchise agreement or obligation under an existing city ordinance.[158]

Staff argues that ExteNet's reliance on the plain words of Chapter 283 is improper. According to Staff, the legislature purposefully chose the phrase "certificated to offer" LETS when enacting H.B. 1777 because it did not want to limit Chapter 283 to the incumbent telephone companies. Otherwise, new competitors such as CLECs would not be covered,

---

[156] Staff Initial Brief at 10.

[157] Tex. Local Gov't Code § 283.004.

[158] 16 Tex. Admin. Code § 26.465(h).

because they were not yet universally providing LETS in 1998. ExteNet responds by pointing out that Section 283.002(2) was revised in 2005, and yet the legislature did not alter the "certificated to offer" language.[159] The ALJs find this persuasive.. When the legislature modified the definition of a CTP in 2005, it added the phrase: "or a person who provides voice service." It could also have changed the existing language to require that a CTP be providing local exchange service.[160] Yet, it did not.

Staff argues that ExteNet should not be considered a covered CTP because it has never offered LETS. In response, ExteNet points out that the only time restrictions placed on the company were that it was required to notify the Commission if it had not provided "a service"[161] for a period of 12 consecutive months and that an SPCOA certificate holder which had not "provided service within 48 months of being granted the certificate may have its certificate suspended or revoked, after due process and hearing pursuant to the Commission's rules."[162] Despite these provisions, ExteNet applied for and was granted a renewal of its SPCOA on July 17, 2014, approximately eight years after the Commission issued the original SPCOA

---

[159] *See Love v. City of Dallas*, 40 S.W.2d 20, 23–24 (1931) ("Since the Legislature has used different words to express its meaning, we must conclude that the language employed was not intended to express the same meaning."); *Missouri, K.&T. Ry. Co. of Tex. v. Gregory*, 226 S.W. 1075 (1918) ("[H]ad the Legislature intended otherwise, it rationally would have employed different or additional words in said act."). Courts are particularly resistant to attempts to read additional language into a statutory provision where that statute has recently been amended, as is the case here. *See Silva-Trevino v. Holder*, 742 F.3d 197, 201 (5th Cir. 2014) (rejecting Attorney General's novel interpretation of longstanding deportation clause after noting that other aspects of the statute were extensively amended just a few years earlier and that Congress "could have given some indication" if it wanted courts to enforce the deportation clause in a new way); *Martinez v. Second Injury Fund of Tex.*, 789 S.W.2d 267, 270 (Tex. 1990) (rejecting agency's attempt to introduce non-existent notice requirement into statute where the Legislature "could have done so by express provision . . . when it amended [the statute]" to clarify filing requirements).

[160] ExteNet also notes that the legislature amended the definition of a CTP after the Commission issued its Order on Certified Issue in Docket No. 24480, in which ExteNet asserts that the Commission determined a certificated entity was not required to be providing LETS to be covered under Chapter 283.

[161] COH Official Notice Ex. 18 (Notice of Approval) at 4-6. The word "service" in the Commission's Notice of Approval is not defined.. However, ExteNet argues that the grant of the SPCOA recognizes that it was for facilities-based, data, and resale *telecommunications* services. COH Official Notice Ex. 18 at 3 (Ordering Paragraph No. 1)(emphasis added); *also see* COH Official Notice Ex. 17 (ExteNet's Application for SPCOA) at 8 (Response to Q4(a) where ExteNet identified that it was providing a business Optical Service, which according to the PUC form is considered a telecommunications service).

[162] COH Official Notice Ex. 18 at 4 (Ordering Paragraph No. 5).

in 2006.[163] ExteNet points out that, at the time the original application and renewal were filed, no party to this proceeding, objected to or questioned ExteNet's eligibility for the SPCOA or its renewal.

Finally, ExteNet argues that the Commission has held that a certificated entity is not required to actually provide LETS in order to be a CTP under Chapter 283.[164] In 2001, Metromedia Fiber Network Services, Inc. (MFN) was constructing a fiber ring and offered nonswitched point-to-point service to both wholesale and retail customers. MFN offered no LETS, so it was the City of Carrollton's position that a franchise agreement was required. The question of whether a certificated entity had to actually be providing LETS in order to be a CTP was certified to the Commission. The Commission's Order on Certified Issue concluded:

> An SPCOA holder is authorized, via its certificate, to offer LETS [local exchange telephone service] as well as other telecommunications services unless the certificate is restricted to specifically exclude LETS. *Thus, satisfying the definition of CTP in Chapter 283 requires only that a person is a certificate holder with the authority to provide LETS and not upon the actual provision of services by a certificate holder as the City contended.* Consequently, the City's argument that MFN does not currently offer LETS is irrelevant to this issue because MFN possesses the authority to offer LETS by virtue of its SPCOA. Accordingly, *the Commission concludes that an SPCOA holder providing nonswitched telecommunications services is a CTP within the meaning of Chapter 283 of the TEX. LOC. GOV'T CODE to the extent the SPCOA holder is certificated to offer local exchange telephone service.*[165]

The ALJs find the Commission's holding in the MFN Decision persuasive on this issue. ExteNet is not excluded from coverage under Chapter 283 because the company does not offer LETS.

---

[163] COH Official Notice Ex. 19 (ExteNet On-line Filing for Renewal of SPCOA) (dated July 17, 2014).

[164] *Complaint of Metromedia Fiber Network Services, Inc. Against the City of Carrollton, Texas Under the Public Utility Regulatory Act and HB 1777*, Docket No. 24480, Order on Certified Issue (Sept. 28, 2001) (MFN Decision).

[165] MFN Decision at 4-5 (emphasis added).

3. Chapter 283 Does Not Require ExteNet's Backhaul to Qualify as an Access Line Before it is Covered

Staff's second argument is related to its first; Staff argues that, only when a CTP's provision of service generates an access line will a city be compensated for the CTP's use of the city's right of way under Chapter 283. Staff asserts that Chapter 283 is a two-step process. The first step is to determine whether a CTP has "access lines" as defined in 16 Texas Administrative Code § 26.461(c)(1)(A)(i-iv). That is, the first step is to determine whether a CTP has facilities located in the right of way that are used to provide LETS or another qualifying service. Because ExteNet's facilities and services generate no access lines, ExteNet's backhaul is not covered under Chapter 283.

ExteNet disagrees arguing that Staff points to no language in Chapter 283 or in the Commission's implementing rules that says a CTP is only covered by the statute if it has access lines to report. ExteNet also argues that Staff's position is not supported by the Commission's Orders. The Commission's MFN Decision, for instance, is directly contrary to Staff's theory.[166] ExteNet also argues that it is inconceivable the Commission would adopt such a process without discussing it in its Project No. 20935 implementing H.B. 1777. Furthermore, ExteNet argues that a two-step process would suffer from impracticalities that render it inconsistent with Chapter 283's objective that compensation be administratively simple.

The ALJs agree with ExteNet on this argument. Staff's point is that, to be covered under Chapter 283, a CTP must provide some form of qualifying service, such as LETS. While a rulemaking may conclude that this is the intent of Chapter 283, the MFN Decision conflicts with such a conclusion. Furthermore, when it implemented Chapter 283, the Commission was aware of the potential for wireless CTPs to provide backhaul, and yet included no distinction between different types of backhaul in its rules.

---

[166] *See* MFN Decision at 4-5.

VIII. CONCLUSION

The ALJs find that ExteNet is a CTP under Chapter 283 and that ExteNet provides backhaul service. Backhaul is excluded from the definition of "access line," and therefore, ExteNet is not subject to a Chapter 283 fee for its backhaul service.

IX. FINDINGS OF FACT

Introduction and Procedural History

1. On October 23, 2015, ExteNet Network Systems, Inc. (ExteNet) filed a complaint against the City of Houston (City or Houston) alleging that the City improperly imposed fees for the use of the public right of way and seeking a determination by the Public Utility Commission of Texas (Commission) of the amount of compensation, if any, due to the City for placement of telecommunications facilities in the public right of way under Chapter 283 of the Texas Local Government Code (Chapter 283) and the Commission's implementing rules.

2. Both Commission Staff (Staff) and the City filed Motions to Dismiss.

3. On January 16, 2016, the Commission issued an Order of Referral, referring the case to the State Office of Administrative Hearings (SOAH).

4. On March 25, 2016, the Commission issued its Preliminary Order and did not rule on the pending Motions to Dismiss.

5. The hearing convened on October 4, 2016, and the record closed on December 29, 2016, with the filing of proposed findings of fact and conclusions of law.

6. Staff's and City's Motions to Dismiss were carried with the case, and are denied with the issuance of this Proposal for Decision (PFD).

Chapter 283 Law and Policy

7. The deregulation of the local exchange telecommunications industry took place in Texas in 1995, closely followed by federal deregulation in 1996.

8. Prior to deregulation, local exchange carriers operated as local area monopolies.

9. The incumbent local exchange carriers enjoyed market advantages over the competitive local exchange companies.

10. In 1999, the 76th Texas Legislature enacted Chapter 283 to eliminate the anticompetitive practices by replacing local franchise agreements with a state-level regulatory regime.

Certificated Telecommunications Provider (CTP)

11. ExteNet holds Service Provider Certificate of Operating Authority (SPCOA) No. 60769 granted by the Commission in 2006, which the Commission renewed in 2014.

12. ExteNet is a CTP certificated to offer Local Exchange Telephone Service (LETS).

Access Lines

13. ExteNet has no access lines.

14. Access lines are used to calculate the fee paid to municipalities under Chapter 283.

15. Backhaul is excluded from the count of access lines.

16. Since 2010, the Commission has not reviewed the definition of "access line" to determine whether changes are needed to the definition due to changes in technology or in the market.

Base Amount

17. The base amount is the amount each city was paid under the franchise fee scheme in effect prior to the passage of Chapter 283.

18. The base amount was calculated by adding franchise, license, permit, and application fees, plus in-kind services or facilities. Taxes, special assessments, and pole rental fees were excluded from the base amount.

19. To determine the base amount, each city totaled its compensation received, then divided (on an allocated basis) the total amount by the number of access lines to determine the proper fee to be assigned to each type of access line.

20. With no access lines, ExteNet is not affected by the base amount calculations.

ExteNet's Facilities (Preliminary Order Issue No. 1)

21. ExteNet is a wholesale distributed antenna system (DAS) provider. The DAS service extends from an antenna located on a utility pole back to the Commercial Mobile Radio Service (CMRS) provider's hub location.

22. The DAS service routes customers' cellphone calls to the CMRS provider's hub and switch to allow the CMRS provider to connect the caller to the person being called.

23. The DAS technology can provide backhaul to several CMRS providers at the same time and route the call to the appropriate CMRS provider.

24. The node is a collection of several facilities located on or adjacent to a utility pole.

25. At the node is the antenna, placed at a location where there is a "hot spot" of demand from wireless end users.

26. A Remote Radio Head (RRH), which transmits and receives the wireless signal, is located at the node. The RRH is owned by the CMRS carrier, not ExteNet.

27. Coaxial cable that carries the radio frequency signal from the antenna to the RRH is located at the node.

28. ExteNet also installs fiber optic cable at the node. The fiber optic cable begins at the node and runs to the CMRS provider's baseband unit. That distance can be several miles.

29. The antenna and RRH are connected to a fiber patch panel, also at the node. There is an electricity meter, possibly batteries, and an electrical line running to the fiber patch panel and RRH.

30. The fiber cable extending from the node terminates at a baseband unit (BBU) located at the CMRS provider's hub. The BBU routes the CMRS voice and data traffic to the Mobile Switching Office. ExteNet's fiber ends at the BBU.

31. ExteNet only owns the antenna, and one fiber patch panel. The CMRS carrier owns the RRH, the cable connecting the RRH to ExteNet's fiber patch panel, and the cable connecting the fiber patch panel to the CMRS carrier's BBU.

32. ExteNet's equipment is leased to CMRS providers. ExteNet maintains by agreement the CMRS provider-owned equipment.

Services to be Provided by ExteNet (Preliminary Order Issue No. 2)

33. "Backhaul" describes transmission facilities that connect a CMRS provider's cell towers to the CMRS provider's switch.

34. ExteNet provides an unswitched, dedicated, point-to-point transport service to retail CMRS providers.

35. ExteNet is a neutral host provider of backhaul service for retail CMRS providers.

36. Interoffice transport consists of transmission facilities between two central offices.

37. ExteNet does not provide interoffice transport.

38. ExteNet's services are provided exclusively on a wholesale basis, which are not available to the public or effectively available to a substantial portion of the public.

39. ExteNet is not a provider of wireless services, because ExteNet:

- Lacks a right to use specific radio spectrum under license from the Federal Communications Commission;
- Lacks any spectrum allocation to its backhaul service;
- Is not capable of independently providing a radio communication service;
- Installs facilities that are inert;
- Neither sends nor receives any radio communications until activated by ExteNet's CMRS retail customer;
- Does not need a radio license to install the company's backhaul service;
- Lacks a "mobile station," such as a cellphone or other wireless device, on one end of its backhaul service;
- Does not offer CMRS to end user customers; and
- Provides its service exclusively on a wholesale basis, meaning that it is not available to the public.

40. ExteNet provides optical services to business customers, which is a type of telecommunications service.

41. ExteNet, through its fiber, could offer point-to-point service on a wholesale basis in a configuration that does not include a node. ExteNet does not currently offer this service.

X. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this proceeding. Tex. Local Gov't Code § 283.058.

2. SOAH has jurisdiction over the hearing in this matter. Tex. Util. Code § 14.053; Tex. Gov't Code § 2003.049.

3. The parties had sufficient legal notice of the proceeding. 16 Tex. Admin. Code § 22.55.

4. ExteNet is a CTP as defined by Texas Local Government Code § 283.002(2).

5. Chapter 283 creates a uniform state-wide compensation scheme for CTPs under which CTPs are granted access to the rights of way in municipalities by paying a fee for access lines rather than entering into a franchise fee agreement. Tex. Local Gov't Code § 283.056(f).

6. ExteNet is providing backhaul service.

7. ExteNet's backhaul service is excluded from the count of access lines. 16 Tex. Admin. Code § 26.465(f)(3).

8. ExteNet's DAS facilities generate no access lines as defined in 16 Texas Administrative Code § 26.461(c)(1)(A)(i-iv).

9. A CTP is required to pay compensation to the municipality in the amount determined by Chapter 283 and the Commission's rules established under Chapter 283.

10. Chapter 283 implements a uniform method for compensating municipalities for the use of the public rights of way that is, among other things: (a) administratively simple to municipalities and telecommunications providers, (b) is consistent with state and federal law, (c) is competitively neutral, and (d) is nondiscriminatory.

11. Pursuant to 16 Texas Administrative Code § 26.465, the City cannot assess an access line fee on ExteNet's facilities because the Commission excluded backhaul facilities from being assessed an access line fee.

12. ExteNet does not provide a "mobile service" as defined by the Federal Communications Act of 1934, Section 153(33).

XI. ORDERING PARAGRAPHS

In accordance with the findings of fact and conclusions of law, the Commission issues the following orders:

1. The complaint filed by ExteNet Network Systems, Inc. has merit and is granted.

2. The City of Houston may not charge ExteNet for use of the City's right of way for ExteNet's DAS system, which provides backhaul.

3. All other motions, request for entry of specific findings of fact and conclusions of law, and any other request for general or specific relief, if not expressly granted, are denied.

SIGNED February 24, 2017.

WENDY K. L. HARVEL
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

TRAVIS VICKERY
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

EXHIBIT
B

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17120

Review of Issues Relating to Commission Certification of Distributed Antennae System Providers in Pennsylvania	**Public Meeting March 2, 2017** **2517831-LAW** **Docket No. M-2016-2517831**

MOTION OF ROBERT F. POWELSON

Before the Pennsylvania Public Utility Commission (PAPUC or Commission) for consideration is the resolution of a formal proceeding to address the relevant regulatory role of the Commission under applicable Pennsylvania and federal law over distributed antennae systems (DAS) facilities and other attendant issues related to DAS networks.

BACKGROUND

Over the last ten years or so, the Commission has certificated DAS network operators,[1] but without any discussion or analysis of their jurisdictional status. Often, the applicant did not identify itself as a DAS operator, but rather described its intended service as simply providing "point-to-point" transport without any recognition of the radio (wireless) component of the service or, if so, described it as "RF [radio frequency] transport" also without recognizing the essential antenna facilities of the DAS network.[2] The DAS network industry has evolved from a small niche player to prominence as a major driver of the wireless industry's build out of end-user customer facing facilities.

The initial inquiry here is whether Pennsylvania law permits the certification of DAS network operators as public utilities and allows the issuance of certificates of public convenience (CPC) as such.[3] We next review the necessity of a CPC to the DAS operators' construction of

---

[1] Most recently in the *Application of SQF, LLC for approval to offer, render, furnish or supply telecommunication services as a Competitive Access Provider to the Public in the Commonwealth of Pennsylvania*, Docket No. A-2015-2490501 (Order entered November 19, 2015). *See also* the Statement of Vice Chairman John F. Coleman, Jr. and the Dissenting Statement of Commissioner Robert F Powelson.

[2] For example, *see Application of NextG Networks of NY Inc. d/b/a NextG Networks East for approval to offer, render, furnish or supply telecommunication services as a Competitive Access Provider to the Public in the Commonwealth of Pennsylvania*, Docket No. A-311354F0002 (Order entered April 8, 2005); *See also* PA PUC Telephone Tariff No. 1, NextG Networks of NY effective April 14, 2005. NextG is now Crown Castle. Crown Castle Comments at 1, n. 1.

[3] Commenters include: The Wireless Association ("CTIA"), The Wireless Infrastructure Association (PCIA), Crown Castle NG East LLC and Pennsylvania–CLEC LLC (Crown Castle), ExteNet Systems, Inc. (ExteNet), various municipal non-profit associations and many individual municipalities also directly participated. The various associations representing, in aggregate, nearly all of Pennsylvania's 2600 municipalities that filed Comments and Reply Comments are the Pennsylvania Municipal League (PML), the Pennsylvania State Association of Township Supervisors (PSATS), the Pennsylvania State Association of Boroughs (PSAB) and the Pennsylvania State Association of Township Commissioners (PSATC) (collectively Municipal Associations) as well as multiple individual municipalities. The Office of Consumer Advocate (OCA) and the Broadband Cable Association of

facilities. Finally, if DAS networks are not public utility facilities under the Pennsylvania Public Utility Code (Code),[4] then we need to identify next steps to address such an outcome.

DAS NETWORKS

DAS networks provide infrastructure on the end-user side of the traditional CMRS carrier's network. This network collects and delivers end-user wireless traffic on a wholesale basis to the retail CMRS carrier.[5] There are three main actors that interact with the DAS network: the retail CMRS provider;[6] the DAS operator itself; and the retail, end-user customer. The retail CMRS provider, also called the wireless service provider (WSP) in the industry comments, is the DAS operator's customer.[7]

> At its most fundamental, a DAS network is composed of three main components:
> (1) Powered antennae and related signal conversion equipment that transmits (and receives) end-user wireless traffic and that converts the protocol (called the "node");
> (2) Some form of terrestrial transport (most likely fiber) that carries the traffic between the DAS and WSP networks; and
> (3) A connection between the two networks, usually located at the WSP's switch or a carrier hotel (called the "hub").[8]

The DAS wireless antennae are placed on existing municipal light posts, utility poles, buildings, and other structures often in the public right-of-way. DAS carriers also construct their own poles and facilities to support the antennae/node.[9] DAS facilities allow WSPs "to expand their networks in a fast, cost-effective and efficient manner."[10]

Pennsylvania also participated. I want to thank everyone for their participation and comments, which have been extremely helpful to us as we have deliberated on this matter.

[4] Some DAS operators assert that they are certificated in other jurisdictions, but do not specifically speak to the law in those jurisdictions. *See, e.g.,* Crown Castle Comments at 1. The Public Utility Code in Pennsylvania, however, specifically prohibits our regulation of CMRS service as a public utility. We also note that "[i]n some states, state law may only require 'registration' or some other form of approval not called a certificate of public convenience." *Id.* at 13, n. 17. In Pennsylvania, there is no registration category in the telecommunications arena; only full public utilities with CPCs. We also note ExteNet's statement that: "ExteNet is also registered with the Federal Communications Commission ("FCC") to provide interstate telecommunications services." ExteNet Comments at 3.

[5] The traffic typically consists of commingled transmissions of voice, data, and video traffic, including Internet traffic.

[6] Mobile cellular service providers such as Verizon Wireless, AT&T Mobility, Sprint, and T-Mobile are traditional, retail CMRS providers in this category. Municipal Association Comments at 4.

[7] The Municipal Associations describe DAS as follows: "DAS is principally a repeater system that extends or boosts a provider's radio frequency ("RF") signals or spectrum from their network to the edge in order to support end user mobile and stationary devices in areas where their signal coverage and capacity are lacking." Municipal Association Comments at 2. We take this as a general description and not necessarily an engineering one. Crown Castle Reply Comments at 9, CTIA Reply Comments at 3.

[8] PCIA Comments at 3. The OCA Comments cite to three different sources for similar summaries of a DAS network. OCA Comments at 3-4.

[9] DAS networks operate indoors and outdoors. In most indoor applications, the network operator is dealing with a single land owner or landlord. The issues addressed by the commenters principally apply to outdoor DAS and the use of public spaces. As the Municipal Association's explain: "Outdoor DAS focuses on bringing coverage to an

The WSP, not the DAS network operator, exchanges voice traffic with the public switched telephone network (PSTN).[11] DAS business plans do not touch the safety and traditional interconnection issues with which the Commission is normally concerned. The DAS network is not responsible for the hand-off to the 911 emergency center – the WPS is accountable for that. DAS operators also do not interconnect with other carriers or the PSTN – that also is handled by the WSP. DAS networks do not need phone numbers – numbering is the WSP's function.

ISSUES INVOLVING DAS SITING

There are aesthetic and engineering advantages to the deployment of the low height antennae that the cell phone industry is increasingly utilizing either in their own systems or through independent, third-party DAS networks. CTIA articulates the industry transition well:

> Traditional "macrocell" infrastructure – huge antennas bolted to enormous towers and other tall structures – has done an excellent job of extending coverage across Pennsylvania and the rest of the nation, and it will continue to play a critical role in maintaining and expanding that coverage. However, continually-increasing consumer usage due to the widespread adoption of smartphones and the development of wireless broadband dependent applications and services, among other factors, has created a voracious demand for additional wireless *capacity* even in areas where *coverage* is ubiquitous. Further, the forthcoming transition to fifth generation ("5G") wireless networks will require even more infrastructure deployment as the wireless industry continues to enhance its network capabilities to the benefit of consumers.[12]

As the FCC has noted, "DAS deployments offer robust and broad coverage without creating the visual and physical impacts of multiple macrocells." Two years ago, the FCC noted that "DAS and small-cell deployments are a comparatively cost-effective way of addressing increased demand for wireless broadband services, particularly in urban areas. As a result, providers are rapidly increasing their use of these technologies, and the growth is *projected to increase exponentially* in the coming years."[13]

---

outdoor area where the existing network cannot provide adequate coverage or capacity (e.g. a rural area where the signals cannot reach or a dense urban area where the network cannot provide sufficient capacity). It creates capacity boosts where there is a weak signal. Installation of outdoor DAS is more challenging than indoor DAS, because of the outdoor weather elements creating the need for sufficient structure to support wind-load and secure closets for equipment." Municipal Association Comments at 2.

[10] ExteNet Comments at 2.

[11] See, for example *In re Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, FCC No. 14-153, ¶ 34, 29 FCC Rcd. 12,842 (Report and Order released Oct. 21, 2014), 80 Fed. Reg. 1238 (Jan. 8. 2015) ("*Wireless Infrastructure Order*") at ¶ 31 and ExteNet Comments at 21.

[12] CTIA Comments at 1-2 (emphasis in original).

[13] *Wireless Infrastructure Order* at ¶ 34 (emphasis added).

> The challenge of DAS deployment is principally one of land use: Although the facilities used in these networks are smaller and less obtrusive than traditional cell towers and antennas, they must be deployed more densely – *i.e.*, in many more locations – to function effectively. As a result, local land-use authorities in many areas are facing substantial increases in the volume of siting applications for deployment of these facilities. This trend in infrastructure deployment is expected to continue, and even accelerate, as wireless providers begin rolling out 5G services.[14]

At the urging of the wireless industry, Congress and the FCC have increasingly struggled with the associated wireless facility siting issues, attempting to find the line between the preservation of local zoning rights and the public's increasing demand for added wireless capacity. The FCC's 2009 *Shot Clock Ruling*[15] prescribed specific time frames for municipal review and permitting of wireless towers so that wireless deployment would not be delayed or burdened by unreasonable municipal challenges to siting.[16] The FCC further directed that permit denials must be based upon "substantial evidence," prescribed review of environmental impacts, prohibited discriminatory treatment, and established an accelerated judicial review of permit denials. As part of its consideration of the role of DAS facilities in its 2011 *Pole Attachment Order*, the then-Chairman of the FCC acknowledged that "DAS deployments use multiple antennas to extend wireless coverage and provide service more efficiently than conventional wireless antennas."[17]

Next, in 2012, Congress passed the Spectrum Act,[18] which directed that a State or local government may not deny, and shall approve, any request for a modification of an existing wireless tower or base station.[19] The FCC's ensuing *Wireless Infrastructure Order* implemented this Act, as well as extended all prior zoning privileges to DAS facilities.

Nor has all the action been at the federal level. At the end of 2012, the Pennsylvania General Assembly enacted the Wireless Broadband Collocation Act (Act 191), which provides for a streamlined approval process for certain qualifying wireless collocations, modifications and

---

[14] *Streamlining Deployment of Small Cell Infrastructure By Improving Wireless Facilities Siting Policies; Mobilitie, LLC Petition For Declaratory Ruling*, FCC WT Docket No. 16-421, FCC Notice dated December 22, 2016 ("*Mobilitie Petition*") at 2.

[15] *In Re Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance, FCC No. 09-99*, 24 FCC Rcd 13994 (Declaratory Ruling Released Nov. 18, 2009) ("*Shot Clock Ruling*"). The FCC *Shot Clock Ruling* presumptively established what constitutes "a reasonable period of time" for a municipality to act in response to an application to occupy a municipal right of way. *Shot Clock Ruling* at ¶ 37.

[16] These rules were extended to DAS facilities in 2014.

[17] Pole Attachment Order, cite at 139 (mandating a time frame for pole and right-of-way owners to provide broadband providers and deployers of wireless broadband technologies like DAS access to utility poles so as not to delay broadband buildout)(statement of Julius Genachowski).

[18] As part of the Middle Class Tax Relief and Job Creation Act of 2012, 112 Pub. L. 96, Title VI, § 6409(a), 126 Stat. 156, 232 (2012) ("Section 6409(a)"), codified at 47 U.S.C. § 1455(a) ("Spectrum Act").

[19] 47 U.S.C. § 1455(a)(1).

replacements of existing facilities, including DAS.[20] Act 191 extends the wireless industry's rights beyond federal law, including a definition of eligible facilities and a 90-day deadline for decisions on license approvals.

REGULATION OF DAS OPERATORS AS PUBLIC UTILITIES

Turning to the threshold jurisdictional inquiry, DAS networks meet the initial legal test of public utility status since they are operating facilities that convey or transmit messages or communications.[21] The more challenging question, however, is whether the DAS operators are doing so by the technology of "mobile domestic cellular radio", a form of service that is expressly excluded from the definition of "public utility."[22]

Such technology-based regulatory differentiation is not unusual. The Pennsylvania General Assembly has also excluded cable phone and any other form of IP-based telecommunications from Commission jurisdiction except for very limited purposes not germane here.[23] Indeed, by these various exclusions, the Commission has very limited jurisdiction over telecommunications services in Pennsylvania and focuses on traditional incumbent and competitive "landline" telephone offerings. No entity that uses facilities that provision mobile services, other than DAS network operators, have sought a CPC from us.[24]

WIRELESS SERVICE

It is clear that DAS facilities are used to provide a wireless service. In its 2014 rulemaking that extended the wireless tower zoning reforms to DAS networks and their antennae, the FCC ruled that these are wireless facilities entitled to the same siting advantages created in the 1996 Telecommunications Act, the 2009 *Shot Clock Ruling*, the 2011 *Pole Attachment Order*, and the 2012 Spectrum Act.[25]

---

[20] 53 P.S. §§ 11702.1, *et seq.*

[21] 66 Pa. C.S. § 102; *see* § 102(2)(iv) (relating to exclusions from the definition of "public utility"). ("Any person or corporation now or hereafter owning or operating in this Commonwealth equipment or facilities for ... [c]onveying or transmitting messages or communications ... by telephone or telegraph or domestic public land mobile radio service including, but not limited to, point-to-point microwave radio service for the public for compensation ... [except that] [t]he term does not include ... [a]ny person or corporation, not otherwise a public utility, who or which furnishes mobile domestic cellular radio telecommunications service.").

[22] As we noted in our initial order: "CMRS is a defined term in the federal Communications Act but not in the Pennsylvania Public Utility Code (Code). However, we view CMRS as synonymous with "mobile domestic cellular radio telecommunications service," which is the term used in the Code to describe wireless service." February 23, 2016 Order at 3, n.4.

[23] Voice-Over-Internet Protocol Freedom Act, P.L. 627 of 2008, codified at 73 P.S. § 2251.1 *et seq.*

[24] The Commission did, on one occasion, did agree to certificate a "fixed wireless" operation (i.e., immovable end-user base station in the end-user's premises), which did not ultimately become operational and was not issued a CPC. *Application of Vanguard Telecom Corp., d/b/a Cellular One, for Approval to Offer, Render, furnish, or Supply Facilities-based Competitive Local Exchange Telecommunication Services and Facilities-based Competitive Access Provider Services*; Docket Nos. A-310621 F0002 and A-310621 F0003.

[25] *Wireless Infrastructure Order* at ¶ 271 (emphasis added).

Specifically, the FCC stated that DAS "is used to provide personal wireless service" and the antennae installed by DAS network operators are wireless towers[26] for purposes of federal law. As it described in the *Wireless Infrastructure Order*:

> We clarify that *to the extent DAS* or small-cell facilities, including third-party facilities such as neutral host DAS deployments, *are or will be used for the provision of personal wireless services, their siting applications are subject to the same presumptively reasonable timeframes that apply to applications related to other personal wireless service facilities.*[27]

The FCC's conclusion that DAS networks are facilities that utilize wireless (radio) technology in order to provide personal wireless service is persuasive.[28] The FCC sets the rules for CMRS compensation, availability of capacity, auctioning and management of spectrum, customer information, pole attachments, and all other things that are wireless. The regulatory classification of DAS by the FCC as "personal wireless service" is persuasive as we seek to answer the same question under state law.

Nevertheless, the DAS operators contend in this proceeding that they are providing a *landline* service no different from the typical middle mile, point-to-point, "backhaul service" offered by almost every telecommunications carrier.[29] This position, however, is based upon an incomplete description of the DAS network. Simplified, it asserts that the radio frequency – the spectrum – is owned and transmitted by the retail WSP and only passively carried by the DAS carrier as a throughput on terrestrial facilities.

There are several flaws with this line of reasoning. First, the view that the DAS antenna is passive because it does not generate signal is unreasonably restrictive. Even where the signal is generated at the head end (or hub), the DAS antenna transmits (or receives) the radio signal to (and from) the wireless end-user customer.[30] Moreover, the DAS operator's node provides other active functions such as RF-to-optical-RF signal conversion or simple RF conversion at the node/antenna.[31]

---

[26] It is worth reflecting on the fact that no macro tower has ever sought to be certificated by us, only the smaller cells.

[27] *Wireless Infrastructure Order* at ¶ 270. The FCC uses the term "personal wireless services," which it defines as "commercial mobile services, unlicensed wireless services and common carrier exchange access service." 47 USC § 332(c)(7)(C)(i).

[28] The DAS carriers agree that the federal definition should be applied. See, for example CTIA Comments at 10 ("Thus, whether the DAS service provided by CAPs constitutes CMRS under federal law – and thus "mobile domestic cellular radio telecommunications service" under Pennsylvania law – depends on whether it is both a "mobile service" and an "interconnected service" under federal law.")

[29] ExteNet Comments at 16. "In this circumstance, the radios, antennas and facilities qualify as equipment and facilities used to convey communications to the public for compensation, just as traditional wireline transport facilities do."

[30] CTIA Comments at 3.

[31] *Id.* at 3, n. 3.

The DAS operator is operating equipment that plays a vital and active role in a wireless session by providing an antenna that directly interfaces with the end-user's wireless device -- both sending and receiving radio signal. The DAS antenna receives RF at the node, converts it to digital or optical format for transport over a cable or fiber line, only to be converted back to RF at the hub and handed back to the WSP, or the CMRS carrier's ultimate end-user. The fact that the retail WSP holds title to the spectrum license or may generate the signal for the DAS network to carry does not diminish the active collection, conversion, and distribution of the wireless signal by the DAS network.

Nor is it universally true among DAS operators that there is no operator-supplied radio involved or that the retail WSP generates the radio signal back at the hub, as some commenters assert.[32] For example, ExteNet describes its network as supplying radios and generating the radio signal.[33] The FCC notes that small cell operators,[34] one form of microcells, supply radio transceivers at the node.[35]

There is no homogeneity among DAS networks.[36] As the PCIA warns, "it would be a mistake to attempt to define DAS as a specific technological configuration currently deployed by a particular company."[37] I agree that it would be an error to base our ruling on any one narrow view of a network.

Rather, DAS networks should be defined by their functionality (the service furnished), not by any particular configuration of facilities. Our statute excludes from our jurisdiction any person that operates equipment that "furnishes mobile domestic cellular radio telecommunications service." There is no requirement under our law that the service be a stand-alone offering. The term "furnish" as used in the statutory exception means (second definition)

---

[32] The CTIA asserts: "The [DAS operators] do not have any radios in their DAS facilities—all radio equipment is provided by the wireless service provider, either in the form of its base station or in the form of its end users' mobile devices." CTIA Comments at 11.

[33] "The nodes are typically deployed with multiband antennas .... Each antenna is connected to small distributed remote radio units...." ExteNet Comments at 6.

[34] The CTIA observes that: "DAS networks should not be confused with 'small cell' (i.e., picocell, microcell, metrocell and/or femtocell) technologies, which are also used to extend coverage and add capacity to wireless providers " CTIA Comments at 4. Later it recognizes the industry confusion over nomenclature: "Crown Castle NG describes its product as a 'small cell solution.' Regardless of nomenclature, the product is a neutral-host, small node, scalable system typical of a DAS." CTIA Comments at 18, n. 44.

[35] *Wireless Infrastructure Order* at ¶ 31.

[36] As Crown Castle acknowledges, even about its DAS network, "there is no single combination of equipment that defines a DAS network." Crown Castle Comments at 3.

[37] "While this description is high-level, it would be a mistake—both technologically and from a legal or policy perspective—to attempt to define DAS as a specific technological configuration currently deployed by a particular company. DAS is a generic description of a network for providing telecommunications service. Like all telecommunications networks, it is evolving rapidly and being deployed in differing manners by different providers. Accordingly, the Commission should avoid trying to set legal or regulatory treatment based on a narrowly-defined technological configuration that does not accurately reflect an evolving market." PCIA Comments at 3.

"to provide" or "to supply."[38] As previously discussed, DAS networks are used to furnish, supply and provide personal wireless services and, thus, meet this definition.

I disagree with the proposition that DAS networks are just like the landline transport facilities that have been traditionally certificated by us. Stated simply, it is the DAS antennae that causes the crossover into the wireless realm and makes the difference under Pennsylvania law. BCAP, representing the cable companies, states that "backhaul transport service is separate and distinct from *the antenna-based service* offered by DAS operators that may also include a transport segment."[39]

Our Order opening this docket specifically asked the DAS carriers to identify "the demarcation point between a DAS provider's network and the provider's network that it serves, as determined in legal agreements or otherwise..." ExteNet, the only commenter to respond to this question directly, reported that "[t]he hub is traditionally the demarcation or 'meet-me' point between the DAS provider and WSP network. The parties may agree to a different point. In newer architectures, the demarcation point is located in the [WPS] carrier's facility."[40] Based upon this explanation, I conclude that the DAS provider is responsible for the facilities that are located between the end-user's device and the WSP hub, not just from the antenna to the hub. This further buttresses the conclusion that DAS facilities are used to furnish a wireless service.

In treating DAS facilities as wireless in nature, the FCC rejected the same arguments that the DAS operators now assert before us, namely that the DAS network is merely terrestrial back haul:

> *Some commenters argue* that the shot clocks should not apply because some providers describe *DAS and small-cell deployments as wireline*, not wireless, facilities. The City of Eugene, Oregon, for example, argues that the Commission should not consider DAS a personal wireless service because one DAS provider has argued that its service is "no different from, and indeed competes directly with, the fiber-based backhaul/private line service provided by Incumbent Local Exchange Carriers." *This argument is not persuasive*. Determining whether facilities are "personal wireless service facilities" subject to Section 332(c)(7) does not rest on a provider's characterization in another context; rather, the analysis turns simply on whether *they are facilities used to provide personal wireless services.*[41]

---

[38] http://www.macmillandictionary.com/us/dictionary/american/furnish; https://www.merriam-webster.com/dictionary/furnish; https://en.oxforddictionaries.com/definition/furnish. Black's Law Dictionary confirms that the word "furnish" (first definition) means: "To supply or provide."

[39] BCAP Reply Comments at 1 (emphasis added). I would decline to render any ruling on the jurisdictionality of cable company facilities, although BCAP requests one. We are only dealing with DAS networks at this time.

[40] ExteNet Comments at 7.

[41] *Wireless Infrastructure Order* at ¶ 271 (emphasis added).

The wireless association's rebuttal to this citation is circular.[42] The FCC did not equivocate in applying the label of "personal wireless service" to DAS.[43] The point made in the FCC's *Wireless Infrastructure Order* is that, to the extent a DAS operator employs the FCC's rules regarding siting, it agrees that it is providing "personal wireless service."

State law also bears on this point. At the end of 2012, Pennsylvania enacted the Wireless Broadband Collocation Act (Act 191), which provides for a streamlined approval process for certain qualifying wireless collocations, modifications and replacements of existing facilities, including DAS.[44] Act 191 extends favorable land use rules to and "wireless telecommunications facilities" beyond federal law.[45] DAS operators use these rules, which are applicable to "equipment and network components, including antennas, transmitters, receivers, base stations, cabling and accessory equipment, used to provide wireless data and telecommunications services." Again, by taking advantage of the special siting rules applicable to wireless facilities, DAS carriers implicitly concede that their facilities are used to furnish a wireless service.

MOBILE SERVICE

Continuing, because I propose to conclude that DAS facilities are used to furnish radio (i.e., wireless) services, the only remaining legal issue related to our jurisdictional inquiry is whether the service is "mobile."[46] The FCC has only ruled that DAS operators fall into the general category of "personal wireless service" but has not specified which of the three types are involved: "commercial mobile services, unlicensed wireless services and common carrier exchange access service."[47]

---

[42] Interestingly, the individual carriers themselves did not address this important point. However, from the industry association comments it is clear that the operators have availed themselves of the benefits of both the FCC's Shot Clock and the federal Spectrum Act, as well as our state Act 191.

[43] CTIA Reply Comments at 8 (It is clear from the actual language of the Report and Order that the FCC did not "recognize[] DAS providers as PCS," as the Municipal Associations insist, and that the FCC merely clarified that where DAS facilities are or will be used in the provision of PCS, local zoning boards considering siting applications are subject to the deadlines of the Shot Clock Order.') and PCIA Reply Comments at 15-16 (" Rather, it addressed the extent to which DAS facilities qualify for the same siting timeframes laid in the FCC's 2009 'Shot Clock' order. Section 332(c)(7) of the Communications Act differentiates between local government actions that have an impact on personal wireless services and decisions that concern personal wireless service facilities. The FCC did not establish or change any regulatory classification of services provided via DAS networks.").

[44] 53 P.S. § 11702.1, et seq.

[45] Including a definition of eligible facilities and a 90-day deadline for decisions on license approvals. Remedies are in the county courts of common pleas, which decisions are to be rendered on "an expedited basis." There is no role provided for the PUC under Act 191 and the premise of the Act seems incongruous with the "public utility" status of the DAS provider. Because certificated "public utilities" may override local zoning requirements, requiring DAS providers to be certificated as "public utilities" would seem to render the provisions of Act 191 relating to DAS rights on certain facilities within local municipalities unnecessary.

[46] No one argued that the service is not "commercial."

[47] 47 USC § 332(c)(7)(C)(i). The DAS commenters do not assert that they are furnishing either unlicensed wireless services or common carrier exchange access service.

Whether the service is mobile or fixed turns on the end-user's equipment and whether it is mobile under the federal rules, which we will apply here. Incorporating the federal definitions into this analysis, commercial mobile radio is "any mobile service (as defined in section 3) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public."[48] Section 3(27) of the federal Communications Act defines a "mobile service," as "radio communication service carried on between mobile stations or receivers and land stations, and by *mobile stations* communicating among themselves."[49] The Act, in turn, defines a "mobile station" as "*a radio-communication station capable of being moved and which ordinarily does move.*"[50]

The Commenters do not specify the type of consumer equipment with which the DAS networks communicate. My view and the record of this case lead to the conclusion that the wireless communication is to mobile devices such as tablets and smart phones. The DAS operator's comments support this conclusion. The CTIA acknowledges that DAS network transmits "the [radio] signals ... to the end user's *mobile* device."[51] In describing the operation of its network, Crown Castle acknowledges the "radio transmissions between the Node [the DAS antenna] and a carrier customer's subscriber's *mobile* device."[52]

The commenting DAS operators resist application of the term "mobile" on the grounds that they only provide "transport service over fiber optic lines between *stationary* hubs and *stationary* nodes" and deny providing "a service between the Node and any consumer's mobile device."[53] This is a continuation of the position that a DAS network is exclusively using landline facilities to stream the WSP signal that the FCC expressly rejected in its *Wireless Infrastructure Order* and with which this motion concurs. This logic turns all definitions on their head. The large dishes on the macro towers are stationary also, but no one argues that these are part of a fixed, not mobile, service.

Next, the DAS operators argue that they do not provide an "interconnected" service. "Section 332(d)(2) of the Communications Act states that "the term 'interconnected service' means service that is interconnected with the public switched network (as such terms are defined by regulation by the [FCC])."[54] The DAS operators, elsewhere in their comments, concede that calls that flow through their antennae are connected to the public switched telephone network (PSTN). The argument here instead appears to be that the interconnection function is performed by the WPS and not the DAS operator. However, DAS networks provide a WSP's end-user customer with connectivity to the WSP's network, which is interconnected to the PSTN. Thus, DAS service assists in making interconnected voice and/or data service available to end-users a/k/a the public or a substantial portion thereof.

---

[48] 47 USC § 332(d).

[49] 47 USC § 3(27) (emphasis added),

[50] 47 USC § 3(28) (emphasis added).

[51] CTIA Comments at 10 (emphasis added).

[52] Crown Castle Comments at 4 (emphasis added).

[53] *Id.* at 11

[54] CTIA Comments at 12.

In conclusion, DAS facilities furnish mobile domestic cellular radio telecommunications service and, hence, cannot be certificated as public utilities under the Code.

EFFECTS OF LOSS OF PUBLIC UTILITY STATUS

As a preliminary matter, I note that the primary adverse consequence of the possible decertification of DAS networks raised by any party relates *solely* to facilities siting – gaining access to public rights of way and zoning permits to deploy new facilities or to connect to existing structures. None of the traditional earmarks of utility regulation – the establishment of just and reasonable rates or the maintenance of reasonable service – are matters of expressed concern by any commenter.

It is argued that decertification of DAS networks would constitute a barrier to entry in violation of federal law.[55] In my view, decertification of DAS does not violate federal law. Certainly, federal law precludes state and local governments from enacting competitive barriers to market entry against DAS network operators. However, I fail to see how allowing DAS networks to operate free from Commission oversight forms one.

Moreover, federal law cannot be used to compel the Commission to certificate a non-utility in violation of state law based on the effects that losing utility status *may* have on a facilities siting regimen administered by other governmental units. Section 253 does not compel the Commission to come to the aid of a non-jurisdictional entity. To the extent that a local zoning board, for example, enacts an unreasonable requirement, it is that local regulation that violates Section 253 and not the Commission failure to offer assistance.

Moreover, federal law expressly preempts any attempt by this Commission to regulate either market entry of, or the rates charged by, an entity providing CMRS.[56] Thus, federal law precludes us from requiring DAS network operators to obtain a CPC.

In any event, predictions regarding the loss of CPC status among DAS network providers range from no significant change forecast by the municipal participants to an apocalypse projected by the DAS network operators.[57] Several commenters who are DAS operators argue that denying CPCs to providers of DAS service may prohibit or may have the effect of prohibiting DAS service in Pennsylvania by impeding their ability to deploy DAS networks in Pennsylvania. According to one commenter, pole owners frequently require proof that the attaching party holds certification from a governmental authority like the Commission. The

[55] Under Section 253(a) of the Communications Act, "[n]o State or local statute or regulation…may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a).

[56] 47 U.S.C. § 332(c)(3).

[57] See for example: Crown Castle Comments at 17 ("… such an action … would likely discourage innovation… [and] disrupt the marketplace." ; PCIA Comments at 12-13 ("… could well have the legal effect of blocking those providers from accessing public rights-of-way pursuant to 15 Pa. Cons. Stat. § 1511 and the practical effect of the same regarding utility poles."); ExteNet Comments at 2. ("… as a practical matter creates at best a high hurdle to market entry and at worst a barrier to entry.").

commenter adds that local governments in Pennsylvania commonly require the presentation of a CPC as a condition to access public rights-of-way.[58]

I am very mindful of the DAS operator's description of poor treatment at the hands of pole owning utilities and municipal licensing authorities,[59] as well as instances of overreaching by DAS network operators that the municipalities describe. We now explore those specific points of friction between DAS operators and property holders.

POLE ATTACHMENTS

The PAPUC does not regulate pole attachments. The opportunity to do so exists, but the Commission has never triggered the "reverse preemption" provisions of the federal Communications Act.[60] Pennsylvania utilities and pole attachers, therefore, follow the federal rules as designed and administered by the FCC. The FCC recently tightened and strengthened the pole attachment rules, providing lower rates and easier, more efficient attachment by all telecommunications carriers.[61]

DAS commenters argue that pole access often is denied absent "proof" of telecommunications status.[62] ExteNet observes: "As a practical matter, requesting proof of certification is a short cut for utility pole owners. It allows them to avoid expensive, time-consuming research in order to make their own legal determination about what the requesting entity is or is not entitled to by law or regulation."[63] The analogy is that a CPC is "a 'ticket' which demonstrates that the holder is entitled to certain rights and privileges and undertakes certain responsibilities."[64]

At the same time, the DAS commenters acknowledge the FCC has extended pole attachment rights to all telecommunications service providers. Specifically, Section 224 of the federal Communications Act grants pole access rights so long as a company is a telecommunications service provider.[65] This motion expressly recognizes that DAS operators provide telecommunications service. Non-certificated telecommunications providers routinely

---

[58] Crown Castle Comments at 13-14, 15.

[59] *Id.*

[60] 47 U.S.C. § 224(c).

[61] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*; WC Docket No. 07-245 AND GN Docket No. 09-51, Report and Order and Order On Reconsideration released April 7, 2011. Under this ruling, wireless carriers have clearly defined access to poles, including pole-tops and benefit from the lowered attachment rate and specified procedures designed to enhance attachment.

[62] ExteNet Comments at 1 ("The … reality is that a DAS provider without a CPC would be unable to document to pole owners that it is a telecommunications provider, and therefore entitled to access to poles at reasonable rates… This creates a barrier to entry contrary to Section 253(a).").

[63] ExteNet Comments at 19.

[64] *Id.*at 18.

[65] PCIA Comments at 10 (".. technically, certification by a state commission is not required for a provider to access poles. … Nonetheless, telecommunications providers often encounter opposition." PCIA at 10.

gain access to poles, evidencing that a CPC is not required to attach to poles.[66] Thus, no CPC is required for DAS facilities to attach to utility poles.

I decline to issue certificates as a "shortcut," because of alleged unreasonable practices surrounding pole attachments. But, I would also find that it is be illegal for any utility to require a CPC from this Commission as a requirement for allowing a telecommunication service provider to exercise its pole occupancy rights.[67] While the Commission does not regulate pole attachments, going forward, the Commission should entertain complaints alleging deteriorated pole access by electric and telephone public utilities as alleged violations of § 1501 of the Public Utility Code[68] and subject to fines and penalties.[69]

We also note that DAS carriers may register with the FCC to provide interstate telecommunications services,[70] and suggest that the DAS operators employ the fact of registration as proof of "telecommunications" status to the extent that "proof" is necessary.

In conclusion, loss of a CPC does not affect a DAS operator's rights to attach to utility poles.

PUBLIC RIGHT OF WAY OCCUPANCY

The DAS carriers also complain about the behaviors of local municipalities in granting them occupancy in public rights of way. Specifically, the DAS operators claim that "certification is also critical" to a provider's access to public rights of way, because "[u]nder Pennsylvania law, access to the public right-of-way is available [only] to 'public utility corporation[s]'"[71] citing to 15 Pa.C.S. § 1511(e).[72] I disagree. While this statutory section does

[66] Municipal Association Reply Comments at 4 ("Throughout the Commonwealth, cable operators of all sizes routinely negotiate pole attachment agreements and still manage to maintain a profitable business model and serve Pennsylvania residents. It would seem that the wireless industry's fear of a pole attachment Armageddon is negated in its entirety with proper utilization of the rights and benefits conferred by the Pole Act. (See PCIA Comments, page 10, explaining that a DAS provider "without a CPC will face opposition, impediments, and potentially outright barriers to accessing the critical infrastructure.").

[67] To the extent that current pole attachment agreement require a telecommunications service to also hold a CPC from this Commission, we note that such a provision would also violate our ruling here today.

[68] 66 Pa. C.S. § 1501.

[69] When Gamma Ventures sought a Commission certificate, we so warned all public utilities that access to utility poles is an existing right of all telecommunications carriers that does not require a certificate from this Commission. *In Re Application of Gamma Ventures, LLC for Certificate of Public Convenience and Necessity to Provide Telecommunications Services in Pennsylvania*, PA PUC Docket No. A-2014-2412630 (Order entered June 19, 2014). This warning is once again provided as part of this proceeding. To ensure that pole owners are aware of our concerns, this order should be served upon the association representing them and published in the Pennsylvania Bulletin.

[70] ExteNet Comments at 3.

[71] PCIA Comments at 11. See also Crown Castle Comments at 15 ("For access to public rights-of-way, possessing a CPC may be even more critical... therefore get access to the public rights-of-way, the company must be a "public utility corporation.")

[72] 15 Pa.C.S. § 1511(e) ("A public utility corporation shall have the right to enter upon and occupy streets, highways, waters and other public ways and places for one or more of the principal purposes specified in subsection

address public utility access to rights of way, it does not preclude non-certificated entities from also occupying public rights of way, and such access is guaranteed for DAS operators through other laws.

The 1996 Telecommunications Act clearly prohibits any state or local action that would prevent the placement of DAS facilities in public rights of way:

> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.[73]

The 1996 Act expressly recognizes, but also limits the use of local right of way regulation:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, **on a competitively neutral and nondiscriminatory basis**, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.[74] The municipalities concede the requirement to allow public right of way access is obligatory regardless of the possession of a CPC:
>
> Under Section 253(a) of TA-96, if a wireless provider, such as those that utilize DAS systems as a part of their CMRS, can demonstrate a need for its proposed facility, that provider cannot be blocked from installing and operating such facilities by the local zoning authority. By virtue of the fact that DAS systems are typically constructed to infill specific existing capacity and coverage gaps, the DAS provider need only demonstrate the need for such facilities to the local zoning authority and comply with reasonable standards to gain approval for construction, modification and/or placement of facilities in the public rights-of-way.[75]

Furthermore, the commenters raising concerns about public right of way access fail to consider the rules established under state and federal law to facilitate the deployment of wireless facilities, including DAS networks. As noted previously, there

---

(a) and ancillary purposes reasonably necessary or appropriate for the accomplishment of the principal purposes, including the placement, maintenance and removal of aerial, surface and subsurface public utility facilities thereon or therein.").

[73] 47 U.S.C. §253(a).

[74] 47 U.S.C. §253(c) (emphasis supplied).

[75] Municipal Association Comments at 12. See also, Municipal Association Comments at 15 ("A DAS provider does not need public utility status to site its facilities and/or equipment to provide service in Pennsylvania. The right of a DAS provider to access the public rights-of-way to either install new poles, or to attach to existing infrastructure, is not diminished by the refusal to grant a CPC to that provider. First and foremost, a DAS provider still has the ability to locate its facilities on poles and other infrastructure in the public rights-of-way.")

have been three recent developments that have granted greater and better defined public right of way access to wireless facilities, including DAS network facilities. The FCC's 2009 *Shot Clock Ruling;* the FCC's *2014 Wireless Infrastructure Order* (implementing the federal Spectrum Act of 2012); and, finally, the Pennsylvania Wireless Broadband Collocation Act of 2012 (Act 191),[76] have narrowed time frames, required written bases for municipal action, and limited the grounds for rejection. In other words, DAS access to rights of way is robust and becoming more so due to efforts that have nothing to do with the issuance by this Commission of a CPC.

In conclusion, I see no benefit conferred upon DAS operators for public right of way occupancy that they would not have in the absence of a CPC.

OVERRIDING ZONING RULES AND EXERCISING EMINENT DOMAIN

One of the most troubling aspects of this case stems from the fact that the Pennsylvania General Assembly has conferred special powers on certificated public utilities, including an exemption from local zoning rules and the power of eminent domain.[77] Other industries, such as retail CMRS or cable companies, which also compete in the telecommunications space, do not possess such rights.

By granting a CPC, the Commission simultaneously confers DAS operators with the powers of eminent domain and special exemption from local zoning regulations that apply to utility structures other than buildings. [78] These are powerful rights, preserved for special industries and carefully written into our corporate statutes.[79]

The Municipal Associations describe the use of these powers:[80]

---

[76] The various individual municipal comments also recognize the DAS carriers' rights in this regard. City of Allentown Comments at 2, City of Philadelphia Comments at 2, City of Wilkes Barre Comments at 2 ("Moreover, there are ample federal and state zoning laws and regulations that protect wireless providers, including DAS contractors. These include, but are not limited to, the 1996 Telecommunications Act, the FCC's Wireless Infrastructure Order, the FCC's 2009 "Shot Clock" Order, and the PA Wireless Broadband Colocation Act of 2012. In short, DAS contractors are strongly protected under federal and state law without having to grant them utility status.")

[77] Section 1103 of the Business Corporation Law (BCL) defines "public utility corporation" as including "[a]ny domestic or foreign corporation for profit that … is subject to regulation as a public utility by the Pennsylvania Public Utility Commission or an officer or agency of the United States." 15 Pa. C.S. § 1103.

[78] *See Duquesne Light Co. v. Upper St. Clair Twp., et al.*, 105 A.2d 287 (Pa. 1954) (*Duquesne*; *South Coventry Twp. v. Philadelphia Elec. Co.*, 504 A.2d 368 (Pa. Cmwlth. 1986) (*South Coventry*); and *Heitzel v. Zoning Hearing Bd. of Millcreek Twp., 533 A.2d 832, 833 (*Pa. Cmwlth. *1987).*

[79] 15 Pa.C.S. § 1511(a).

[80] Municipal Association Comments at 17 ("With a CPC in hand, they often argue that they are not subject to any type of municipal regulation, including basic zoning requirements.... Furthermore, DAS providers often argue that they are entitled to use their public utility status for access to municipal and state-owned property for the placement of facilities and equipment.")

> CPC issuance to DAS providers pits municipal zoning authority (as preserved by TA-96 and recognized by the FCC in its October 2014 Report and Order) against the rights and privileges associated with Commission certification. It creates an adversarial framework that impedes the interaction between local zoning authorities (i.e., Pennsylvania municipalities) and the wireless industry. The industry's belief that CPCs allow DAS providers unrestricted access to the public rights-of-way – like traditional public utilities enjoy– and to install their wireless facilities without proceeding through the municipal zoning process or gaining any type of municipal approvals, is misplaced.[81]
>
> This is troublesome and creates an opportunity for competitive, for-profit companies to legally "take" private property. It also opens the door for situations in which DAS providers are able to use the Commission's certification to access private property without having to negotiate with the property owner. Surely this was not the intention of the General Assembly when it created the Public Utility Code and outlined the rights and benefits to which a traditional, certificated public utility should be entitled.[82]

The individual municipal comments echo this concern:

> Public utilities can legally take ownership of virtually any public or private property so long as they provide the property owner with just compensation. This is one of the most intrusive powers that could ever be conferred upon a governmental entity, let alone a private company.[83]

Even without a CPC, however, DAS operators will still have the property zoning and occupancy rights under the many, various protections previously catalogued in this motion.[84] Moreover, these rights are protected by federal law specifically for wireless facilities (in addition to the broader protections of § 253):

> The regulation of the placement, construction, and modification of personal wireless service facilities [[85]]by any State or local government or instrumentality thereof ...*shall not unreasonably discriminate* among providers of functionally equivalent services; *and shall not prohibit or have the effect of prohibiting the provision of personal wireless services.*[86]

---

[81] Municipal Association Reply Comments at 7-8.

[82] *Id.* at 7.

[83] City of Allentown Comments at 2, City of Philadelphia Comments at 2, City of Wilkes Barre Comments at 2.

[84] We also note the likelihood that the FCC is set for another round of wireless facility siting review. *Mobilitie Petition*, FCC Notice dated December 22, 2016.

[85] As noted previously, the FCC has ruled that DAS networks are "personal wireless service facilities" in the *Wireless Infrastructure Order* and extended these rights to them.

[86] Section 332(c)(7) of TA-96. This same section compels zoning action "within a reasonable period of time" and be "in writing and supported by substantial evidence contained in a written record..." These rights have been

As previously discussed, similar zoning rights are guaranteed to DAS operators under Act 191.

Upon review, the only property rights that DAS network operators would forgo with the loss of certificated public utility status would be the power of eminent domain and to override local zoning rules. This outcome is appropriate in my opinion and is consistent with the federal and state approach to the siting of wireless facilities, which is one of streamlining local zoning and not overriding it. The property rights granted to traditional public utilities are based upon the concepts of natural monopoly, universal obligation to serve the public, protection of the public from unjust or discriminatory charges and inadequate service. These concepts have no application here. DAS operators have sought CPCs is to obtain the property rights associated with public utility status.

No statute or regulatory rule has granted such powers to DAS facility operators. The General Assembly has been enduringly silent on the issuance of CPCs to DAS operators. Indeed, Act 191 *applies and shapes the zoning rules applicable* to wireless facility siting. It does not override them. Also, Act 191 recognizes no special corporate status for DAS operators under the Public Utility Code. Nor was the Commission given any authority or asked to play any role under Act 191. Oversight of zoning disputes over wireless facility siting was given to "the courts of common pleas of the county where [the facility] is located."[87] The same is true under federal law.[88]

In summary, the premise of these enacted statutes and rules is incongruous with granting "public utility" status to the DAS network provider. Certificating DAS carriers as "public utilities" with the right to override local zoning requirements renders the provisions of Act 191, for example, unnecessary. By certificating, the Commission extends the DAS operators rights beyond those intended for them by the Pennsylvania General Assembly under Act 191 and the Congress by the Spectrum Act.

I am not comfortable providing greater property rights to any industry than are defined by the General Assembly.

CONCLUSION

This Commission has issued certificates to DAS network as far back as 2005, when the industry was in its nascent stages and without any discussion or debate. It has continued to grant CPCs, but has increasingly questioned the legality and need of doing so given the heightened DAS siting activity in recent years and the associated controversies.

The explosive deployment of DAS networks in in the last two or three years has caused the Commission to open this docket to evaluate the prudence and effect of issuing CPCs to a

---

improved (from a DAS perspective) subsequently under the *Shot Clock Ruling* and the *Wireless Infrastructure Order*.

[87] 53 P.S. § 11702.5(a).

[88] 47 USC § 332(c)(7) ("... commence an action in any court of competent jurisdiction").

portion of the wireless industry whose business focus is the deployment of towers and antennae that extends and makes WSP deployment, particularly CMRS, more robust.

Since those original certifications, DAS facility operators have developed a more favorable environment for ensuring that their equipment can be effectively positioned without a certificate from the PUC. The Pennsylvania General Assembly and Congress have enacted statutes that expressly define and grant the property rights necessary to deploy wireless networks. Moreover, the FCC has issued several decisions further bolstering these rights. These actions obviate the DAS operators' objective in seeking the Commission's certification in the first place – gaining property rights for wireless facility siting. These efforts are ongoing and will further refine DAS operator property rights.

Today, I conclude that DAS operators are operating networks that furnish service to wireless mobile devices. Given that our enabling state statute unequivocally places the operation of CMRS facilities outside of our regulatory purview and based upon the comments presented here, this motion declares DAS networks to be beyond the Commission's regulatory reach.

DAS networks are not public utilities under Pennsylvania state law. As articulated above, where a carrier operates an antenna, the function of which is to receive and transmit wireless radio, the service is more than simply terrestrial, wireline back haul and, I have concluded that, the facilities provide CMRS.

I fully support the deployment of broadband services, no matter the medium. The Commission is not authorized, however, to grant super property rights to DAS networks and I decline to exceed the statutory authority granted us by the General Assembly.

NEXT STEPS

In view of the forgoing analysis, if the DAS industry seeks the affirmative conference of "public utility corporation" rights, the debate needs to be transitioned to General Assembly and/or Congress. I would also note state legislatures around the country are enacting further reforms for wireless facility deployment.[89] Were such an effort to come to Pennsylvania, the Commission would welcome the opportunity to participate if invited to do so.

Going forward, absent a change of law, the Commission will not issue certificates of public convenience to companies for the operation of DAS networks and certificates may not be used for the placement of DAS network facilities.

[89] In Arizona, SB 1214 would allow an entity to install, operate, and maintain microcell equipment and small cell equipment in the public highways within a political subdivision under certain conditions. In California, SB 649 would apply the prohibitions that relate to the siting of wireless telecommunications facilities in the public rights of way to the approval of small cell facilities. HF 380 in Iowa proposes specific "rules and limitations" for the application for and deployment of small wireless facilities. In Virginia, SB 1282, a bill that seeks to provide a uniform procedure for the way in which wireless infrastructure is approved by localities and installed in the public rights of way has been sent to the Governor for his signature.

As to existing certificates issued to DAS network operators, the Commission staff will undertake research and engage in individual discussions with those companies to determine whether their certificates should be rescinded. The Commission's actions do not affect the placement of any facilities that occurred while a DAS operator may have held a CPC from this Commission. On the other hand, existing certificates shall not be used to define property rights to construct new DAS facilities.

The technology will undoubtedly change and basing our ruling upon a particular configuration of facilities would not be advisable. However, the facilities that provision CMRS include the antennae[90] itself, as well as associated radio transceivers, antennas, coaxial or fiber-optic cable, regular and backup power supplies, and associated equipment. Any proposed new tower structure built for the sole or primary purpose of supporting the antenna and associated facilities would also be included in facilities excluded from public utility status under the Public Utility Code.

As noted by both the Office of Consumer Advocate and the PCIA, there are a variety of wireline-based backhaul carriers that the Commission certificates and it is not our intention to foreclose DAS carriers from obtaining a certificate for that line of business.[91]

If the company provides other services that are within the Commission's jurisdiction, this motion permits the company to amend its initial application with supporting data thereto. In so doing, the Commission will remove the DAS network aspect from the prior orders granting certification and focus strictly on the wireline portion of the company's business model.[92]

THEREFORE, I MOVE:

1. That Law Bureau prepare an Opinion and Order consistent with this Motion.
2. That within 90 days of the entry date of this order, the Bureau of Technical Utility Services (BTUS) complete an investigation of previously-granted certificates of public convenience for the purposes of identifying carriers engaged in the construction and operation of DAS networks.
3. That within 180 days of the entry date of this Order, BTUS complete an examination of those previously-certificated companies identified as DAS carriers for the purpose of determining whether or not such companies provide other services within the Commission's jurisdiction. BTUS may ask for additional time as needed.
4. That BTUS issue revised orders clarifying the certificates of DAS network operators that offer services other than CMRS as defined in this motion.
5. That BTUS refer DAS-only companies to Law Bureau for the purposes of issuing default orders to rescind their CPCs upon 30 days' notice in accordance with due process.

---

[90] The FCC's rules, while not binding upon us are helpful. Section 17.2(a) defines "antenna structure" as including "the radiating and/or receive system, its supporting structures and any appurtenances mounted thereon." 47 C.F.R. § 17.2(a).

[91] PCIA Comments at 8.

[92] As part of this process, BTUS may also investigate claims of zero intrastate revenues, which may be a separate basis for rescinding existing or declining to issue new certificates to offer intrastate services.

6. That BTUS notify the Secretary's Bureau to revoke the provisional authority of any pending applications of DAS-only networks and return those applications as unfiled.
7. That a copy of this order be served on the Energy Association of Pennsylvania, the Pennsylvania Telephone Association and the Broadband Cable Association of Pennsylvania
8. That a copy of this order be published in the Pennsylvania Bulletin.

Date: March 2, 2017

Robert F. Powelson

ROBERT F. POWELSON
COMMISSIONER

EXHIBIT
C

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CROWN CASTLE NG EAST LLC,

Petitioner,

DOAH Case No. _____

vs.

STATE OF FLORIDA,
DEPARTMENT OF TRANSPORTATION

Respondent.
_____/

PETITION FOR ADMINISTRATIVE DETERMINATION
OF INVALIDITY OF PROPOSED RULE

Petitioner, Crown Castle NG East LLC ("Crown Castle"), pursuant to Sections 120.52(8), 120.56(1) and (2), Florida Statutes, and Rule 28-106.201, Florida Administrative Code, files this Petition for Administrative Determination of Invalidity of Proposed Rule (the "Petition").

Through this Petition Crown Castle challenges amendments to Rule 14-46.001, Florida Administrative Code, proposed by Florida Department of Transportation ("FDOT" or the "Department") as published in the November 8, 2016 (Vol. 42 No. 218) issue of the Florida Administrative Register as well as the Notice of Correction and Notice of Change to the proposed amendments to Rule 14-46.001 published in the December 16, 2016 (Vol. 42 No. 243) issue of the Florida Administrative Register (collectively the "Proposed Rule").

The stated purpose of the rule, which is not affected by the proposed amendments, is to

> regulate the location and manner for installation and adjustment of utility facilities on any [FDOT] right of way, in the interest of safety and the protection, utilization, and future development of such rights of way, with due consideration given to public service afforded by adequate and economical utility installations, and to provide procedures for the issuance of permits.

Fla. Admin. Code R. 14-46.001(1). Prior to June 2015, and over a period of many years, FDOT issued to Crown Castle and its predecessors more than 45 permits for the installation of its wireless communications facilities and fiber infrastructure in public rights-of-way under FDOT's jurisdiction and control pursuant to Rule 14-46.001 and the statute that it implements, Section 337.401, Florida Statutes. Only after FDOT contracted with a private party, which is a competitor of Crown Castle, to manage FDOT rights-of-way did FDOT begin taking the position that "installation of a wireless device by [u]tility [p]ermit is not authorized by [Section] 337.401," as FDOT notified Crown Castle on June 30, 2015, when revoking permits previously issued by FDOT to Crown Castle and denying applications for new permits. Nothing about Section 337.401 or Rule 14-46.001 had changed to justify this position—a position that FDOT has continued to apply and implement notwithstanding the complete lack of statutory or regulatory authority.

FDOT's stated purpose and summary of the Proposed Rule mistakenly suggest that it is a simple update of FDOT's Utility Accommodations Manual which provides permitting conditions for utilities in state rights-of-way. In reality, however, the Proposed Rule is much more than a simple update to the Utilities Accommodations Manual because it seeks to, among other things, redefine the term "utility" to exclude providers of telecommunications services that provide such services using wireless devices, such as Crown Castle. In this regard the Proposed Rule is an invalid exercise of delegated legislative authority because it modifies and contravenes Section 337.401. As described in further detail below, the Proposed Rule is also an invalid exercise of delegated legislative authority because: (a) the Proposed Rule exceeds the grant of rulemaking authority provided to FDOT by the Legislature in Section 337.401; (b) the Proposed Rule is arbitrary and capricious because it will unduly and unlawfully discriminate against

telecommunications providers that use wireless facilities compared to those that do not and is not supported by any facts or logic particularly considering that FDOT has issued many permits to Crown Castle or its predecessors under Section 337.401 for the very wireless devices for which FDOT now takes the position that utility permits under Section 337.401 are not authorized; (c) FDOT materially failed to follow the applicable rulemaking procedures and requirements relating to preparation of a statement of estimated regulatory costs; and (d) the FDOT wrongly rejected Crown Castle's proposed lower cost regulatory alternative.

Identification of the Parties

1. FDOT is the affected agency. FDOT's address is 605 Suwannee Street, Tallahassee, Florida 32399-0458. Crown Castle does not have knowledge of FDOT's file or identification number for this matter, if any.

2. The Petitioner is Crown Castle, a Delaware limited liability company authorized to transact business in Florida with its principal address at 1220 Augusta Drive, Suite 600, Houston, Texas 77057 and offices at 2000 Corporate Drive, Canonsburg, Pennsylvania 15317. For purposes of this proceeding, the address, e-mail address, facsimile number, and telephone number of Crown Castle shall be that of its undersigned counsel.

3. Crown Castle is a provider of telecommunications services and an industry leader in the construction, installation, operation and maintenance of telecommunications infrastructure that facilitates wireless and broadband communications. Crown Castle is certificated by the Florida Public Service Commission as a competitive local exchange telecommunications company and alternative access vendor pursuant to Chapter 364, Florida Statutes, relating to regulation of telecommunications companies.

Statement of Ultimate Facts

Background

4. Crown Castle uses its networks to provide telecommunications services to other telecommunications carriers, primarily providers of wireless telecommunications services. Crown Castle deploys fiber over which it provides communication transmission services to its customers primarily through distributed antenna systems ("DAS") and other small cell networks. DAS and small cell networks are essential to meet the growing need and demand for broadband services. These networks are primarily comprised of a fiber backbone that delivers traffic to and from small nodes consisting of antennas and associated electronic equipment that are frequently installed in the public rights-of-way. DAS and small cell networks can deliver targeted services to specific locations where coverage is otherwise difficult to achieve or where there is a concentrated demand for wireless communication services.

5. Section 337.401(1)(a), Florida Statutes, authorizes FDOT and local governmental authorities that have jurisdiction and control of public roads or publicly owned rail corridors to "prescribe and enforce reasonable rules or regulations" with reference to a utility placing and maintaining its facilities across, on, or within the public rights-of-way. Section 337.401(1)(a) defines "utility" as "any electric transmission, ***telephone***, telegraph, ***or other communications service lines; pole lines; poles***; railways; ditches; sewers; water, heat or gas mains; pipelines; fences; gasoline tanks and pumps; ***or other structures***. . . . ." § 337.401(1)(a), Fla. Stat. (2016) (emphasis added). Section 337.401(2), Florida Statutes, provides that: "No utility shall be installed, located, or relocated unless authorized by a written permit . . . ." § 337.401(2), Fla. Stat. (2016).

6. Rule 14-46.001, Florida Administrative Code, is FDOT's rule regulating the location and manner for installation and adjustment of utility facilities on FDOT rights-of-way pursuant to Section 337.401. Rule 14-46.001 was last amended effective January 30, 2011. A copy of Rule 14-46.001 as currently in effect is attached as Exhibit "A."

7. Rule 14-46.001(2)(a) states that "FDOT will issue permits for the construction, alteration, operation, relocation, removal, and maintenance of utilities upon the right of way in conformity with the FDOT *Utility Accommodation Manual* (UAM), August 2010 edition" which is incorporated by reference in the rule. A copy of the August 2010 edition of FDOT's Utility Accommodation Manual (the "2010 UAM") is attached as Exhibit "B."

8. Section 2 of the 2010 UAM defines "utility" as "[a]ll lines such as pipes, wires, pole lines, ***and appurtenances*** used to transport or transmit, electricity, steam, gas, water, waste, ***voice or data communication, radio signals***, or storm water not discharged onto the FDOT R/W." (emphasis added). Section 4..4 of the 2010 UAM addresses wireless utilities on limited access rights-of-way and incorporates by reference FDOT's Telecommunication Policy.[1]

9. As noted above, over the a period of approximately seven years prior to June 30, 2015, FDOT issued to Crown Castle and its predecessors more than 45 permits for the installation of its wireless communications facilities and fiber infrastructure in public rights-of-way administered by FDOT. These permits were issued pursuant to Section 337.401, Rule 14-46.001, and the 2010 UAM (or the prior, 2007 edition of the Utilities Accommodation Manual).

10. On September 23, 2014, FDOT published a Notice of Development of Rulemaking relating to proposed amendments to Rule 14-46.001 to incorporate a revised Utilities Accommodation Manual.

[1] Upon information and belief FDOT has recently attempted to repeal, other than through rulemaking proceedings, the Telecommunications Policy incorporated by reference in Rule 14-46.001.

11. In December 2014, FDOT entered into a lease and operating agreement with ROWStar, LLC ("ROWStar") that gives ROWStar the right to lease FDOT rights-of-way in Districts 1, 4, 5 and 7 in return for the private entity sharing revenues from such leases with FDOT. Upon information and belief, FDOT subsequently entered into an additional agreement with ROWStar on or after October 23, 2015 that gives ROWStar the right to lease FDOT rights-of-way in Districts 2, 3, and 6, excluding Florida's Turnpike Enterprise rights-of-way.

12. In early 2015, Crown Castle submitted several utility permit applications as it had done in the past seeking to place its lines and nodes in FDOT's rights-of-way in St. Augustine, Florida. FDOT granted those permit applications.

13. On or about March 10, 2015, FDOT's State Utilities Engineer authored an e-mail entitled "Guidance for wireless devices and associated utility lines" (the "Guidance Memo") which states, in pertinent part:

> Wireless devices are not considered utilities and are not governed by Rule 14-46 nor the Utility Accommodation Manual (UAM). No utility permits are to be issued for wireless devices. However, wireless devices are allowed on the Department's R/W by lease. These leases are administered through the Traffic Operations Office. In most all circumstance, these wireless devices need physical lines, for data and power in order to function. The physical lines are considered utilities and are governed by Rule 14-46 and the UAM. Therefore, lines serving the wireless device require utility permits regardless of whether they are owned by of the owner of the wireless device or another Utility Agency/Owner (UAO).

Thus, under the Guidance Memo, Crown Castle could only place its wireless devices on FDOT rights-of-way pursuant to a lease and would have to also obtain a utility permit for any physical lines utilized in connection with the wireless devices. A copy of the Guidance Memo is attached as Exhibit "C."

14. Although Section 337.251, Florida Statutes, authorizes FDOT to lease property, including rights-of-way, for commercial purposes, Section 337.251(6), Florida Statutes,

expressly states that: "This section does not require rights-of-way lease arrangements for facilities of utilities which provide water, sewer, gas, telecommunication, or electric services for which utilities may obtain permits from the department." § 337.251(6), Fla. Stat. (2016).

15. On or about June 30, 2015, FDOT revoked the permits it had issued to Crown Castle earlier in the year. FDOT also denied several pending applications for similar permits.

16. On or about July 29, 2015, FDOT informed Crown Castle that it was denying additional pending applications for permits.[2]

FDOT's Prior Rulemaking Attempts

17. Following the denial and revocation of Crown Castle's permit applications and permits in June and July of 2015, FDOT set about to attempt to amend Rule 14-46.001 through multiple efforts at rulemaking.

18. More specifically, FDOT issued a Notice of Proposed Rule on October 22, 2015, which was withdrawn on December 11, 2015, after Crown Castle challenged the proposed rule. *See Crown Castle NG East, LLC v. Florida Department of Transportation,* DOAH Case No: 15-006710RP.[3]

19. Subsequently, on August 2, 2016, FDOT issued another Notice of Proposed Rule that would amend Rule 14-46.001. That proposed rule which was withdrawn on August 24, 2016.

Procedural Background Relating to the Proposed Rule

[2] Crown Castle filed a petition to for formal administrative hearing, and supplement to such petition, with FDOT challenging FDOT's denial of Crown Castle's permit applications and revocation of its previously issued permits pursuant to Sections 120.569 and 120.57, Florida Statutes. By agreement of the parties, this matter is currently being held in abeyance.

[3] As a result of the withdrawal of that proposed rule, Crown Castle's 2015 rule challenge petition was rendered moot.

20. On November 8, 2016, FDOT issued the Notice of Proposed Rule relating to the Proposed Rule that is the subject of this Petition. A copy of the Notice of Proposed Rule is attached as Exhibit "D."

21. Crown Castle provided written comments in response to the Proposed Rule on November 25, 2016 and also requested a hearing on the Proposed Rule. A copy of Crown Castle's comments on the Proposed Rule is attached as Exhibit "E."

22. FDOT conducted hearings on the Proposed Rule on November 29 and December 9, 2016. Crown Castle presented oral comments reflecting its concerns regarding the Proposed Rule and asked questions[4] about the Proposed Rule at the December 9, 2016 rule hearing.

23. On November 29, 2016 Crown Castle submitted a proposal for a lower cost regulatory alternative ("LCRA") to FDOT.[5] A copy of Crown Castle's proposed LCRA is attached as Exhibit "F."

24. On December 16, 2016, FDOT provided Crown Castle a Statement of Estimated Regulatory Costs ("SERC") including a response rejecting the Crown Castle's LCRA.[6] A copy of the SERC is attached as Exhibit "G."

25. On December 16, 2016, FDOT also issued two separate Notices of Change/Withdrawal. One of the Notices of Change/Withdrawal is a "Notice of Correction" indicating that FDOT prepared a SERC in response to the LCRAs presented by Crown Castle and FCG. The Notice of Correction goes on to state that the SERC "concluded that the rule amendment will not have an adverse impact on economic growth, job creation or employment,

---

[4] Despite the requirement in Section 120.54(c)1., Florida Statutes, that an agency must ensure that staff is available at a hearing to respond to questions or comments regarding a proposed rule, several of Crown Castle's questions went unanswered.

[5] The Florida Electric Power Coordinating Group ("FCG") also submitted a proposed LCRA to FDOT in response to the Proposed Rule.

[6] The SERC indicated that FDOT agreed to make one change to the proposed 2017 Utilities Accommodation Manual in response to the LCRA submitted by FCG, but otherwise rejected FCG's LCRA.

private sector investment, or business competitiveness, and is not likely to increase regulatory costs," and that FDOT has determined that the Proposed Rule is not expected to require legislative ratification based on the SERC. A copy of the Notice of Correction is attached as Exhibit "H."

26. The second Notice of Change/Withdrawal published on December 16, 2016, made certain changes to the Proposed Rule in accordance with Section 120.54(3)(d)1., Florida Statutes. A copy of that Notice of Change/Withdrawal is attached as Exhibit "I."

Aspects of the Proposed Rule Relating to Permitting of Wireless Facilities

27. The Proposed Rule would replace the 2010 UAM with the "FDOT *Utility Accommodation Manual* (UAM), 2017 edition" (the "2017 UAM") which is incorporated by reference in the Proposed Rule. A copy of the 2017 UAM reference in the Proposed Rule is attached as Exhibit "J."

28. Section 1.2 of the 2017 UAM would revise the definition of "utility" to read as follows:

> Utility: All active, deactivated or out-of-service electric transmission lines, telephone lines, telegraph lines, other communication services lines, pole lines, ditches, sewers, water mains, heat mains, gas mains, pipelines, gasoline tanks and pumps owned by the UAO.[7]

29. This definition would remove references to "appurtenances[,]" "voice or data communication[,]" and "radio signals" that are included in the definition of "utility" in the 2010 UAM currently incorporated by reference in Rule 14-46.001.

30. The 2017 UAM incorporated by reference in the Proposed Rule would also remove all references to wireless utilities and FDOT's Telecommunication Policy which is

[7] The UAO is defined in the 2017 UAM as: "Utility Agency/Owner. The entity that owns the utility."

currently incorporated by reference in the 2010 UAM which in turn is incorporated by reference in Rule 14-46.001.

Bases for Invalidation of the Proposed Rule

The Proposed Rule Modifies and Contravenes Section 337.401, Florida Statutes

31. A proposed rule is an invalid exercise of delegated legislative authority if the proposed rule modifies or contravenes the specific provisions of law implemented. § 120.52(8)(c), Fla. Stat. (2016).

32. The mere grant of rulemaking authority is not sufficient to adopt a rule as there must also be a specific law to be implemented. *See* § 120.52(8)(f), Fla. Stat. (2016). Citation to the specific provisions of law implemented is required by Section 120.54(3)(a), Florida Statutes.

33. The Proposed Rule cites to Section 337.401 as one of the statutes being implemented by the Proposed Rule.

34. Section 337.401(1), Fla. Stat., defines a "utility" as "any electric transmission, telephone, telegraph, ***or other communications services lines; pole lines; poles***; railways; ditches; sewers; water, heat, or gas mains; pipelines; fences; gasoline tanks and pumps; ***or other structures*** . . ." § 337.401(1), Fla. Stat. (2016) (emphasis added).

35. The Proposed Rule purports to implement Section 337.401 by incorporating the 2017 UAM. The 2017 UAM, however, defines "utility" in substantially different terms than as clearly defined by the Legislature in the statute. Specifically, the 2017 UAM's definition of "utility" eliminates references to "poles," "appurtenances," and "other structures."

36. The Legislature has defined "utility" in Section 337.401. The differences in the definition of "utility" in the Proposed Rule as compared to the statute that the Proposed Rule

purports to implement modify and contravene the specific provision of law that the Proposed Rule seeks to implement.

37. Crown Castle meets the statutory definition of "utility" in Section 337.401 and existing Rule 14-46.001. The definition of "utility" in the Proposed Rule which modifies and contravenes Section 337.401 would exclude telecommunications providers that use wireless telecommunications infrastructure to facilitate wireless and broadband communications, like Crown Castle, that fall within the statutory definition.

38. The Proposed Rule is therefore an invalid exercise of delegated legislative authority because it modifies and contravenes the specific provisions of law that it purports to implement, namely, Section 337.401, Florida Statutes.

FDOT Has Exceeded Its Grant of Rulemaking Authority

39. A proposed rule is an invalid exercise of delegated legislative authority if "[t]he agency has exceeded its grant of rulemaking authority. § 120.52(8)(b), Fla. Stat. (2016); *see also State, Bd. of Trs. v. Day Cruise Ass'n, Inc.* 794 So. 2d 696, 700 (Fla. 1st DCA 2001) ("[A]gencies have rulemaking authority only where the Legislature has enacted a specific statute, and authorized the agency to implement it, and then only if the (proposed) rule implements or interprets specific powers or duties, as opposed to improvising in an area that can be said to fall only generally within some class of powers or duties the Legislature has conferred on the agency.").

40. The Proposed Rule identifies Sections 334.044(2), 337.401, 337.405, Florida Statutes, as providing the rulemaking authority for the Proposed Rule.

41. Section 334.044(2) is a general, and not specific, grant of rulemaking authority to FDOT. Section 334.405, Florida Statutes, grants FDOT the authority to adopt rules relating to

trees or other vegetation within the rights-of-way. Section 334.401, Florida Statutes, authorizes FDOT to adopt "reasonable rules or regulations" relating to the placing or maintaining of utility facilities within the rights-of-way. Section 334.401 defines "utility" and does not provide FDOT with any authority whatsoever to adopt a definition of "utility" through rulemaking that differs from that in the statute.

42. Accordingly, the Proposed Rule is an invalid exercise of delegated legislative authority because it exceeds the grant of rulemaking authority given to FDOT by the Legislature in Section 337.401. § 120.52(8)(b), Fla. Stat. (2016).

The Proposed Rule is Arbitrary and Capricious

43. A proposed rule is an invalid exercise of delegated legislative authority if it "is not supported by logic or the necessary facts" or is "adopted without thought or reason or is irrational." § 120.52(8)(e), Fla. Stat. (2016).

44. As previously stated, for approximately seven years preceding June 2015, FDOT issued to Crown Castle and its predecessors more than 45 permits for the installation of wireless communications facilities and substantial fiber infrastructure[8] in public rights-of-way administered by FDOT.

45. FDOT's decision to upend its long-standing practices to now single out telecommunications providers that facilitate wireless communications from traditional landline providers, without any statutory change in authority requiring or allowing FDOT to do so, is arbitrary and capricious. FDOT has provided no, and Crown Castle is not aware of any, logical reasons or facts that support FDOT's sudden change in agency policy.

46. Moreover, the Proposed Rule is also irrational and without reason. This is particularly true considering the discriminatory aspects of the Proposed Rule which will not treat

[8] FDOT continues to process and issue fiber permits provided that the fiber does not terminate at a node location.

all "utilities" as defined in Section 337.401 in a competitively neutral manner and may very well violate federal law.

47. The federal Communications Act, 47 U.S.C. § 253(a), prohibits states from adopting any requirement that prohibits or has the effect of prohibiting the ability of any company to provide telecommunications services. Telecommunications providers that do not utilize wireless facilities will be able to obtain permits under the Proposed Rule, but telecommunications providers, such as Crown Castle, will only be able to place their facilities on FDOT rights-of-way if they first obtain a lease from ROWStar. Meanwhile, ROWStar, which itself is a provider of services in competition with Crown Castle, has access to use of the FDOT rights-of-way for its facilities. Moreover, Crown Castle has not yet been successful in attempting to negotiate any lease with ROWStar for use of FDOT rights-of-way now apparently controlled by ROWStar and, upon information and belief, ROWStar has not entered into any lease for installation of wireless devices in FDOT rights-of-way.

48. Because the Proposed Rule is arbitrary and capricious, it is an invalid exercise of delegated legislative authority. § 120.52(8)(e), Fla. Stat. (2016).

FDOT Has Materially Failed to Follow the Applicable Rulemaking Procedures

49. A proposed rule is an invalid exercise of delegated legislative authority if "[t]he agency has materially failed to follow the applicable rulemaking procedures or requirements set forth" in Chapter 120, Florida Statutes. § 120.52(8)(a), Fla. Stat. (2016).

50. Section 120.541(1)(e), Florida Statutes states that "the failure of an agency to prepare a statement of estimated regulatory costs or to respond to a written lower cost regulatory alternative as provided in this subsection is a material failure to follow the applicable rulemaking procedures or requirements set forth in this chapter."

51. FDOT did not issue a statement of estimated regulatory costs when it initially published the Proposed Rule on November 8, 2016. Section 120.541(1)(a), Florida Statutes, however, provides that upon the submission of a lower cost regulatory alternative, the agency is required to prepare a statement of estimated regulatory costs.

52. As noted above, both Crown Castle and FCG submitted LCRAs. Only then did FDOT prepare a SERC. The SERC prepared by FDOT, however, materially fails to comply to Section 120.541, Florida Statutes, in several respects.

53. First, Section 120.541(2) requires a statement of estimated regulatory cost to include an economic analysis. Although FDOT's SERC tracks the statutory language, it does not reflect any real economic analysis as required by Chapter 120.

54. Second, FDOT failed to materially comply with Section 120.541(2)(b), Florida Statutes, which requires the agency to provide "[a] good faith estimate of the number of individuals and entities likely to be required to comply with the rule, together with a general description of the types of individuals likely to be affected by the rule."

55. FDOT's SERC states the general description of the types of individuals likely to be affected by the Proposed Rule as: "All companies that have active, deactivated or out-of-service electric transmission lines, telephone lines, telegraph lines, other communication services lines, pole lines, ditches, sewers, water mains, heat mains, gas mains, pipelines, gasoline tanks and pumps within FDOT's right-of-way." *See* Exhibit "G" at p. 4.

56. This description is simply a restatement of the entities that would fall within the new definition of "utility" that FDOT is attempting to adopt in the Proposed Rule through incorporation of the 2017 UAM. FDOT's description fails to include entities, like Crown Castle, that will undoubtedly be affected by the Proposed Rule. These entities are included within the

definition of "utility" in Section 337.401 and in existing Rule 14-46.001, but would be excluded from the definition of "utility" under the Proposed Rule, if adopted.[9]

57. FDOT's SERC therefore has failed to provide good faith estimates of the types, and perhaps the numbers, of entities who are affected by the Proposed Rule.

58. Third, FDOT's SERC has failed to provide a good faith estimate of regulatory and transactional costs likely to be incurred by entities affected by the Proposed Rule.

59. Section 120.541(2)(a)(3), Florida Statutes, makes clear that agencies are to include transactional costs in their economic analysis of the amount of direct and indirect regulatory costs that will be incurred by individuals and entities who are required to comply with the requirements of the proposed rule.

60. Transactional costs are defined as:

> direct costs that are readily ascertainable based upon standard business practices, and include filing fees, the cost of obtaining a license, the cost of equipment required to be installed or used ***or procedures required to be employed in complying with the rule, additional operating costs incurred***, the cost of monitoring and reporting, and ***any other costs necessary to comply with the rule***.

§ 120.541(2)(d), Fla. Stat. (2016) (emphasis added).

61. Crown Castle, in its public comments to FDOT dated November 25, 2016, and in its proposal for a lower cost regulatory alternative dated November 29, 2016, identified numerous additional costs in excess of $200,000 in the aggregate within one year of the implementation of the Proposed Rule. *See* Exhibits "E" and "F."

62. Chief among these increased regulatory costs is the fact that, with no intervening statutory change or grant of statutory authority, FDOT has upended its longstanding practice of

---

[9] It is unclear whether this failure to identify utilities like Crown Castle as affected by the rule also results in erroneous information in the SERC about the number of utility companies who have received permits from FDOT. *See* Exhibit "G" at p. 4.

issuing permits to telecommunications providers for installation of DAS and small cell nodes and fiber infrastructure in public rights-of-way. During the summer of 2015, FDOT rescinded existing permits granted to Crown Castle and denied pending applications for future permits, citing the policy that FDOT is now attempting to adopt through rulemaking as the reason.

63. Instead of the prior neutral permitting process, FDOT is forcing all telecommunications providers that utilize wireless devices including DAS and small cell nodes to obtain leases from a private vendor, ROWStar, to have access to rights-of-way owned or controlled by FDOT. Whereas the prior permit process was available at no cost to telecommunications providers like Crown Castle, the proposed leasing process will force telecommunications providers that utilize wireless devices and need to place such facilities in the public rights-or-way to build out their networks to incur significant additional costs to obtain and maintain the leases.

64. FDOT's SERC erroneously discounts these agency-imposed regulatory costs. The SERC states that $0 in regulatory costs will be imposed on affected entities as a result of the Proposed Rule, which as previously explained, is patently without merit.

65. Furthermore, FDOT's SERC denies that the cost of obtaining a lease from ROWStar is an increased regulatory cost, despite the statute's directive to identify all transactional costs as a part of providing an economic analysis of increased regulatory cost, and defining those "transactional costs" to include "procedures required to be employed in complying with the rule, additional operating costs incurred, . . . and any other costs necessary to comply with the rule." § 120.541(2)(d), Fla. Stat. (2016).

66. FDOT, thus, has failed to engage in the good faith "economic analysis" required under § 120.541, Florida Statutes, and instead appears to have engaged in no economic analysis

whatsoever because it has erroneously excluded from the definition of regulatory and transactional costs the increased costs of compliance, operational costs, and the new procedures that entities like Crown Castle are required to implement in securing leases at significant cost.

67. In addition to materially failing to comply with the applicable rulemaking procedures regarding preparation of a statement of estimated regulatory costs, FDOT also materially failed to comply with the applicable rulemaking procedures in rejecting Crown Castle's LCRA as described in more detail below.

68. The fact that FDOT materially failed to materially comply with the applicable rulemaking procedures in Chapter 120 is yet another reason why the Proposed Rule is an invalid exercise of delegated legislative authority.

The Proposed Rule Imposes Regulatory Costs on Regulated Persons Which Could be Reduced By the Adoption of Less Costly Alternatives that Substantially Accomplish the Statutory Objectives

69. Section 120.54(1)(d), Florida Statutes, provides that:

> In adopting rules, all agencies must, among the alternative approaches to any regulatory objective and to the extent allowed by law, choose the alternative that does not impose regulatory costs on the regulated person . . . which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

§ 120.54(1)(d), Fla. Stat. (2016).

70. A proposed rule is an invalid exercise of delegated legislative authority if "[t]he rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives." § 120.52(8)(f), Fla. Stat. (2016).

71. Crown Castle properly and timely submitted a LCRA, which showed that compliance with the Proposed Rule would increase regulatory costs for telecommunications

providers, like Crown Castle, that formerly were able to obtain permits at no cost. Under FDOT's Proposed Rule such providers would have to obtain leases at a cost. Crown Castle proposed that FDOT resume regulation of placement of wireless communications facilities within public rights-of-way under the former permitting system, which complies with Section 337.401 and provided a well-established and efficient process that was understood by the private sector and would result in lower regulatory costs than under the Proposed Rule.

72. FDOT erroneously rejected Crown Castle's LCRA, without engaging in any substantive analysis, but instead stating that the cost of a lease was not an increased regulatory cost because FDOT is acting to manage or control state-owned lands and thus is acting in a proprietary capacity and not a regulatory capacity.

73. As previously stated in this petition regarding FDOT's material failure to comply with rulemaking procedures, FDOT's forcing entities like Crown Castle to incur additional regulatory costs in the form of leases with FDOT's contractor falls within the statutory definition of regulatory and transactional costs upon which FDOT is required to perform an economic assessment. FDOT's argument that it is acting in a proprietary capacity does not eliminate its duty to provide a good faith economic analysis of the increased regulatory and transactional costs, as defined under § 120.541, within its SERC.

74. Moreover, FDOT's actions in forcing telecommunications providers to whom it previously issued permits, to instead obtain leases at a significant cost from a private vendor under contract with FDOT, is regulatory and not proprietary in nature. FDOT's single cited case to the contrary is to a special concurrence of a per curiam affirmed decision that was applied in a different context to a different state agency with regard to state sovereign lands.

75. Numerous court decisions show that governments have a regulatory, not a proprietary interest, in regulating the use of public rights-of-way. *See, e.g.*, *Colen v. Sunhaven Homes, Inc.*, 98 So. 2d 501, 504 (Fla. 1957) (describing a proprietary function as an affirmative nongovernmental function; distinguishing a county's interest in the use of public rights-of-way as a governmental, not proprietary, function). Indeed, the title of Section 334.401, the very statute that the Proposed Rule purports to implement, is "[u]se of right-of-way for utilities subject to ***regulation***." FDOT cannot transform its regulatory government function of permitting the use of space in public rights-of-way from a "regulatory" to a "proprietary" function simply by contracting the management of the regulatory government function to a private vendor to administer at higher cost through lease agreements and then attempting to define "utilities subject to regulation" in a manner inconsistent with Section 334.401 to exclude entities such as Crown Castle that meet the statutory definition.

76. Further, if an entity were to place its wireless facilities on an FDOT right-of-way without obtaining a lease or a permit, FDOT would presumably take some enforcement action, again demonstrating that FDOT's regulations relating to placement of facilities on its rights-of-way is a regulatory function and the associated costs are regulatory in nature.

77. The regulatory costs on utilities such as Crown Castle regulated by FDOT with respect to placement of facilities on FDOT rights-of-way could be reduced by the adoption of the LCRA proposed by Crown Castle. FDOT's wrongful rejection of that LCRA is yet another reason why the Proposed Rule is an invalid exercise of delegated legislative authority.

Disputed Issues of Material Fact

78. The disputed issues of material fact of which Crown Castle is aware at this time[10] include:

a. Whether FDOT intends for the definition of "utility" in the 2017 UAM incorporated by reference in the Proposed Rule to exclude wireless devices;

b. Whether, through the Proposed Rule, FDOT intends to implement the Guidance Memo;

c. Whether the Proposed Rule modifies or contravenes Section 337.401, Florida Statutes;

d. Whether FDOT exceeded its grant of rulemaking authority in issuing the Proposed Rule;

e. Whether the Proposed Rule is discriminatory in nature;

j. Whether the Proposed Rule fails to provide competitive neutrality among telecommunications providers;

k. Whether the Proposed Rule has the effect of prohibiting the ability of a company, such as Crown Castle, to provide telecommunications services;

l. Whether the definition of "utility" in the Proposed Rule is not based on any fact or logic;

m. Whether the Proposed Rule was adopted without thought or reason and is irrational;

n. Whether the Proposed Rule is arbitrary and capricious;

[10] Crown Castle reserves the right to amend or supplement this Petition, including but not limited to the disputed issues of material fact, to the extent that Crown Castle learns of additional issues of material fact in the course of discovery or preparation for hearing in this matter.

o. Whether FDOT conducted the economic analysis required by Section 120.541, Florida Statutes, in issuing its SERC;

p. Whether FDOT's estimate in its SERC of the number of individuals and entities likely to be required to comply with the Proposed Rule as well as its description of the individuals likely to be affected by the Proposed Rule was prepared in good faith;

q. Whether FDOT's estimate of transactional costs in its SERC was prepared in good faith;

r. Whether FDOT materially failed to comply with the applicable rulemaking procedures in Chapter 120, Florida Statutes;

s. Whether FDOT improperly rejected Crown Castle's LCRA; and

t. Whether the regulatory costs that would be imposed under the Proposed Rule could be reduced by the adoption of a less costly alternative that substantially accomplishes the statutory objections in Section 337.401.

Notice of Agency Decision

79. Crown Castle received notice of FDOT's Proposed Rule when it was published in the Florida Administrative Register on November 8, 2016. Crown Castle received the SERC prepared by FDOT in connection with the Proposed Rule when it was provided to Crown Castle by FDOT on December 16, 2016. Crown Castle received notice of the correction and changes to that Proposed Rule when they were published in the Florida Administrative Register on December 16, 2016. In accordance with Section 120.56(2)(a), Florida Statutes, this Petition is being filed within 20 days of the SERC having been prepared and made available as provided in Section 120.54(1)(d), Florida Statutes, and within 20 days after the date of publication of the notice of change required by Section 120.54(3)(d), Florida Statutes.

Substantial Interests Affected

80. As previously noted, Crown Castle owns significant telecommunications and broadband infrastructure in Florida. Crown Castle needs the ability to install its telecommunications facilities on FDOT rights-of-way in order to provide and expand its service offerings. Multiple of Crown Castle's existing facilities were constructed pursuant to and operate under permits issued by FDOT in accordance with Section 337.401, Florida Statutes, and Rule 14-46.001, Florida Administrative Code. In light of FDOT's sudden change in policy in 2015, which has yet to be adopted by rule and cannot lawfully be adopted by rule absent a change in statute, Crown Castle currently is unable to place any of its facilities on the public rights-of-way controlled by FDOT and has been unable to do so since June of 2015.

81. Adoption by FDOT of the Proposed Rule would at best require Crown Castle to incur significant additional expenses in placing its facilities on FDOT rights-of-way if it is even able to obtain a lease from ROWStar and, at worst, will entirely preclude Crown Castle from placing any of its facilities on FDOT rights-of-way. Thus, Crown Castle will suffer injury if the Proposed Rule is adopted. Accordingly, Crown Castle is a person substantially affected by the Proposed Rule and is entitled to seek an administrative determination of the invalidity of the Proposed Rule through this proceeding. § 120.56(1), Fla. Stat. (2016).

Statutes and Rules that Entitle Crown Castle to Relief

82. Crown Castle is entitled to relief pursuant to Sections 120.52, 120.54, 120.541, 120.56, 120.595, 334.401, Florida Statutes, Rules 14-46.001 and Chapter 28-106, Florida Administrative Code, and the established decisional law of Florida courts, the Division of Administrative Hearings and administrative agencies.

Attorneys' Fees and Costs

83. Crown Castle has retained the undersigned counsel and is obligated to pay its attorneys a reasonable fee for their services.

84. Crown Castle is or will be entitled to recovery of its attorney's fees under Section 120.595(2), Florida Statutes.

Request for Relief

6. WHEREFORE, Crown Castle respectfully requests that:

a. The Division of Administrative Hearings assign an Administrative Law Judge to conduct a hearing on this Petition;

b. The Administrative Law Judge enter a Final Order finding that the portions of the Proposed Rule described herein are an invalid exercise of delegated legislative authority;

c. The Administrative Law Judge award Crown Castle its reasonable attorneys' fees and costs; and

d. The Administrative Law Judge grant such other relief as deemed appropriate.

Respectfully submitted this 5th day of January, 2017.

/s/ Karen D. Walker
Karen D. Walker
Fla. Bar No. 0982921
karen.walker@hklaw.com
Mia L. McKown
Florida Bar No. 0897140
mia.mckown@hklaw.com
Tara Price
Fla. Bar. No. 98073
tara.price@hklaw.com

HOLLAND & KNIGHT LLP
315 S. Calhoun Street
Tallahassee, FL 32301
Telephone: (850) 224-7000
Facsimile: (850) 224-8832

Attorneys for Petitioner, Crown Castle NG East LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Administrative Determination of Invalidity of Proposed Rule has been furnished this 5th day of January, 2017 via electronic mail to:

Tom Thomas, Esq., General Counsel
Susan Schwartz, Esq., Assistant General Counsel
Florida Department of Transportation
605 Suwannee Street
Tallahassee, Florida 32399-0458
tom.thomas@dot.state.fl.us
susan.schwarz@dot.state.fl.us

/s/Karen D. Walker
Karen D. Walker

EXHIBIT
D

DRAFT ORDINANCE FOR NEW AND SUBSTANTIALLY CHANGED WIRELESS COMMUNICATION FACILITIES

Chapter 18.90

City of Vista, California

CONTENTS

ORDINANCE

18.90.010 LEGISLATIVE INTENT

The City of Vista intends this Chapter to establish reasonable and uniform standards and procedures for wireless facilities deployment, construction, installation, collocation, modification, operation, relocation and removal within the City's territorial boundaries, consistent with and to the extent permitted under federal and California state law. The standards and procedures contained in this Chapter are intended to, and should be applied to, protect and promote public health, safety and welfare, and also balance the benefits that flow from robust, advanced wireless services with the City's local values, which include without limitation the aesthetic character of the City, its neighborhoods and community.

This Chapter is not intended to, nor shall it be interpreted or applied to: (1) prohibit or effectively prohibit any personal wireless service provider's ability to provide personal wireless services; (2) prohibit or effectively prohibit any entity's ability to provide any interstate or intrastate telecommunications service, subject to any competitively neutral and nondiscriminatory rules or regulation for rights-of-way management; (3) unreasonably discriminate among providers of functionally equivalent services; (4) deny any request for authorization to place, construct or modify personal wireless service facilities on the basis of environmental effects of radio frequency emissions to the extent that such facilities comply with the Federal Communication Commission's regulations concerning such emissions; (5) prohibit any collocation or modification that the City may not deny under federal or California state law; or (6) otherwise authorize the City to preempt any applicable federal or California state law.

18.90.020 DEFINITIONS

The abbreviations, phrases, terms and words in this Chapter will have the meanings assigned to them in this Section 18.90.020 or, as may be appropriate, in Chapter 18.02 (Purpose, Interpretation and Definitions), as may be amended from time to time, unless context indicates otherwise. Undefined phrases, terms or words in this section will have the meanings assigned to them in 47 U.S.C. § 702, as may be amended from time to time, and, if not defined therein, will have their ordinary meanings. In the event that any definition assigned to any phrase, term or word in this section conflicts with any federal or state-mandated definition, the federal or state-mandated definition will control.

"**Approval authority**" means the commission, board or official responsible for review of permit applications and vested with the authority to approve or deny such applications. The approval authority for a project which requires a minor use permit or administrative temporary use permit refers to the Zoning Administrator. The approval authority for a project which requires a special use permit refers to the Planning Commission.

"**Base station**" means the same as defined by the FCC in 47 C.F.R. § 1.40001(b)(1), as may be amended, which defines that term as a structure or equipment at a fixed location that enables FCC-licensed or authorized wireless communications between user equipment and a communications network. The term does not encompass a tower as defined in 47 C.F.R. § 1.40001(b)(9) or any equipment associated with a tower. The term includes, but is not limited to, equipment associated with wireless communications services such as private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul. The term includes, but is not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, regular and backup power supplies, and comparable equipment, regardless of technological configuration (including distributed antenna systems and small-cell networks). The term includes any structure other than a tower that, at the time the relevant application is filed with the State or local government under this section, supports or houses equipment described in 47 C.F.R. § 1.40001(b)(1)(i)-(ii) that has been reviewed and approved under the applicable zoning or siting process, or under another State or local regulatory review process, even if the structure was not built for the sole or primary

purpose of providing such support. The term does not include any structure that, at the time the relevant application is filed with the State or local government under this section, does not support or house equipment described in 47 C.F.R. § 1.40001(b)(1)(i)-(ii).

"**Collocation**" means the same as defined by the FCC in 47 C.F.R. § 1.40001(b)(2), as may be amended, which defines that term as the mounting or installation of transmission equipment on an eligible support structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes. As an illustration and not a limitation, the FCC's definition effectively means "to add" and does not necessarily refer to more than one wireless facility installed at a single site.

"**CPCN**" means a "Certificate of Public Convenience and Necessity" granted by the CPUC or its duly appointed successor agency pursuant to California Public Utilities Code §§ 1001 *et seq.*, as may be amended.

"**CPUC**" means the California Public Utilities Commission established in the California Constitution, Article XII, § 5, or it's duly appointed successor agency.

"**FAA**" means the Federal Aviation Administration or its duly appointed successor agency.

"**FCC**" means the Federal Communications Commission or its duly appointed successor agency.

"**OTARD**" means any over-the-air reception device subject to 47 C.F.R. §§ 1.4000 *et seq.*, as may be amended, and which includes satellite television dishes not greater than one meter in diameter.

"**Personal wireless services**" means the same as defined in 47 U.S.C. § 332(c)(7)(C)(i), as may be amended, which defines the term as commercial mobile services, unlicensed wireless services and common carrier wireless exchange access services.

"**Personal wireless service facilities**" means the same as defined in 47 U.S.C. § 332(c)(7)(C)(i), as may be amended, which defines the term as facilities that provide personal wireless services.

"**RF**" means radio frequency.

"**Section 6409**" means Section 6409(a) of the Middle Class Tax Relief and Job Creation Act, Pub. L. No. 112-96, 126 Stat. 156 (Feb. 22, 2012), codified as 47 U.S.C. § 1455(a), as may be amended or superseded.

"**Temporary wireless facilities**" means portable wireless facilities intended or used to provide personal wireless services on a temporary or emergency basis, such as a large-scale special event in which more users than usual gather in a confined location or when a disaster disables permanent wireless facilities. Temporary wireless facilities include, without limitation, cells-on-wheels ("COWs"), sites-on-wheels ("SOWs"), cells-on-light-

trucks ("COLTs") or other similarly portable wireless facilities not permanently affixed to site on which is located.

"**Tower**" means the same as defined by the FCC in 47 C.F.R. § 1.40001(b)(9), as may be amended, which defines that term as any structure built for the sole or primary purpose of supporting any FCC-licensed or authorized antennas and their associated facilities, including structures that are constructed for wireless communications services including, but not limited to, private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul, and the associated site. Examples include, but are not limited to, monopoles, mono-trees and lattice towers.

"**Transmission equipment**" means the same as defined by the FCC in 47 C.F.R. § 1.40001(b)(8), as may be amended, which defines that term as equipment that facilitates transmission for any FCC-licensed or authorized wireless communication service, including, but not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, and regular and backup power supply. The term includes equipment associated with wireless communications services including, but not limited to, private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul.

"**Wireless**" means any FCC-licensed or authorized wireless communication service transmitted over frequencies in the electromagnetic spectrum.

18.90.030 APPLICABILITY

(a) **Applicable Wireless facilities.** This Chapter applies to all existing wireless facilities within the City and all applications and requests for approval to construct, install, modify, collocate, relocate or otherwise deploy wireless facilities in the City, whether located or proposed to be located on private property or in the public right-of-way, unless exempted pursuant to Section 18.90.030(b) or governed under Chapter 18.92 pursuant to Section 18.90.030(c).

(b) **Exempt Wireless facilities.** Notwithstanding Section 18.90.030(a), the provisions in this Chapter will not be applicable to: (1) wireless facilities owned and operated by the City for public purposes; (2) wireless facilities installed on City property in the public right-of-way pursuant to a valid master license agreement with the City; (3) amateur radio facilities; (4) OTARD antennas; (5) wireless facilities installed completely indoors and intended to extend signals for personal wireless services in a personal residence or a business (such as a femtocell or indoor distributed antenna system); and (6) wireless facilities or equipment owned and operated by CPUC-regulated electric companies for use in connection with electrical power generation, transmission and distribution facilities subject to CPUC General Order 131-D.

(c) **Requests for Approval Pursuant to Section 6409.** All requests for approval submitted pursuant to Section 6409 will be first evaluated pursuant to the provisions in Chapter 18.92.

18.90.040 PERMITS REQUIRED

(a) **Minor Use Permit.** A minor use permit, subject to the Zoning Administrator's prior review and approval in accordance with Chapter 18.66 (Minor Use Permits), is required for new wireless facilities and substantial changes to existing wireless facilities that:
  (1) are or will be in preferred locations as defined in Section 18.90.080(a); and
  (2) do not require an exemption pursuant to Section 18.90.070(d).

(b) **Special Use Permit.** A special use permit, subject to the Planning Commission's prior review and approval in accordance with Chapter 18.74 (Variance and Special Use Permits), is required for:
  (1) all wireless facilities in discouraged locations as defined in Section 18.90.080(b);
  (2) all wireless facilities on private property within 500 feet from a residence;
  (3) all unconcealed wireless facilities in any zone; and
  (4) all wireless facilities that require an exemption pursuant to Section 18.90.070(d).

(c) **Administrative Temporary Use Permit.** An administrative temporary use permit, subject to the Zoning Administrator's prior review and approval in accordance with the procedures and standards in Section 18.90.110 is required for any temporary wireless facility, unless deployed in connection with an emergency pursuant to Section 18.90.110(b).

(d) **Other Permits and Regulatory Approvals.** In addition to any special use permit, minor use permit or other permit required under this Chapter, the applicant must obtain all other required prior permits and other regulatory approvals from other City departments, and state and federal agencies. Any special use permit, minor use permit or other permit granted under this Chapter will be subject to the conditions and/or other requirements in any other required prior permits or other regulatory approvals from other City departments, and state and federal agencies.

18.90.050 PERMIT APPLICATIONS

(a) **Application Requirement.** The City shall not approve any wireless facility subject to a minor use permit or special use permit except upon a duly filed application consistent with this Section 18.90.050 and any other written rules the Zoning Administrator may publish in any publicly-stated format.

(b) **Minimum Application Content.** The materials required under this Section are minimum requirements for any application for a special use permit or minor use permit in connection with a wireless facility:
  (1) **Master Application and Applicable Fee.** The applicant must provide the applicable special use permit or minor use permit application form with the applicable application fee.
  (2) **Owner's Authorization and Title Report.** The applicant must provide a title report prepared within the six months prior to the application filing date in order for the City verify the property owner's identity. If the applicant does

not own the subject property, the application must include a written authorization signed by the property owner that empowers the applicant to file the application and perform all wireless facility construction, installation, operation and maintenance to the extent described in the application.

(3) **Regulatory Authorizations.** To the extent that the applicant claims any regulatory authorization or other right to use the public rights-of-way, such as a CPCN, the applicant must provide a true and correct copy of the certificate, license, notice to proceed or other regulatory authorization that supports the applicant's claim.

(4) **Project Plans.** A fully dimensioned site plan and elevation drawings prepared and sealed by a California-licensed engineer showing any existing wireless facilities with all existing transmission equipment and other improvements, the proposed wireless facility with all proposed transmission equipment and other improvements and the legal boundaries of the leased or owned area surrounding the proposed wireless facility and any associated access or utility easements. The plans must contain all other elements and details required for site plans submitted with a special use permit application.

(5) **Site Photos and Photo Simulations.** Photographs and photo simulations that show the proposed wireless facility in context of the site from reasonable line-of-sight locations from public streets or other adjacent viewpoints, together with a map that shows the photo location of each view angle.

(6) **RF Compliance Demonstration.** An RF exposure compliance report prepared and certified by an RF engineer acceptable to the City that certifies that the proposed wireless facility, as well as any collocated wireless facilities, will comply with applicable federal RF exposure standards and exposure limits. The RF report must include the actual frequency and power levels (in watts effective radiated power (ERP)) for all existing and proposed antennas at the site and exhibits that show the location and orientation of all transmitting antennas and the boundaries of areas with RF exposures in excess of the uncontrolled/general population limit (as that term is defined by the FCC) and also the boundaries of areas with RF exposures in excess of the controlled/occupational limit (as that term is defined by the FCC). Each such boundary shall be clearly marked and identified for every transmitting antenna at the project site.

(7) **Acoustic Analysis.** A written report that analyzes acoustic levels for the proposed wireless facility and all associated equipment including without limitation all environmental control units, sump pumps, temporary backup power generators, and permanent backup power generators in order to demonstrate compliance with Chapter 8.32 (Noise Control). The acoustic analysis must be prepared and certified by an engineer and include an analysis of the manufacturers' specifications for all noise-emitting equipment and a depiction of the proposed equipment relative to all adjacent property lines. In lieu of a written report, the applicant may submit evidence from the equipment manufacturer that the ambient noise emitted

from all the proposed equipment will not, both individually and cumulatively, exceed the applicable limits.

(8) **Project Purpose Statement.** A written statement that includes: (a) a description of the technical objectives to be achieved; (b) an annotated topographical map that identifies the targeted service area to be benefitted; (c) the estimated number of potentially affected users in the targeted service area; and (d) full-color signal propagation maps with objective units of signal strength measurement that show the applicant's current service coverage levels from all adjacent sites without the proposed site, predicted service coverage levels from all adjacent sites with the proposed site, and predicted service coverage levels from the proposed site without all adjacent sites.

(9) **Alternatives Analysis.** The applicant must list all existing structures considered as alternatives to the proposed location, together with a general description of the site design considered at each location. The applicant must also provide a written explanation for why the alternatives considered were unacceptable or infeasible, unavailable or not as consistent with the development standards in this Chapter as the proposed location and design. This explanation must include a meaningful comparative analysis and such technical information and other factual justification as are necessary to document the reasons why each alternative is unacceptable, infeasible, unavailable or not as consistent with the development standards in this Chapter as the proposed location. If an existing wireless facility is listed among the alternatives, the applicant must specifically address why the collocation or modification of such wireless facility is not a viable option. If the proposed location is in the public right-of-way, the applicant may perform the alternatives sites analysis on other locations that it considered in the public right-of-way.

(c) **Procedures for a Duly Filed Application.** The City shall not review any application unless duly filed in accordance with the provisions in this Section 18.90.050(c).

(1) **Pre-Submittal Conference.** Before application submittal, applicants must schedule and attend a pre-submittal conference with City staff for all proposed wireless facilities that require a special use permit. The City strongly encourages, but does not require, a pre-submittal conference for all other proposed wireless facilities. The pre-submittal conference is intended to streamline the review process through informal discussion that includes, without limitation, the appropriate project classification and permit requirements, concealment opportunities and/or concerns, potential alternative sites and/or designs, requirements for a complete application, scheduling matters and coordination with other City departments responsible for application review. To minimize unnecessary delays due to application incompleteness, applicants are encouraged (but not required) to bring any draft applications or other materials so that City staff may provide informal feedback about whether such applications or other materials may be incomplete or unacceptable. The Zoning Administrator may, in the Zoning Administrator's discretion, grant a written exemption to

the submittal appointment under Section 18.90.050(c)(2) and/or for a specific requirement for a complete application to any applicant who (i) schedules, attends and fully participates in any pre-submittal conference and (ii) shows to the Zoning Administrator's satisfaction that such specific requirement duplicates information already provided in other materials to be submitted or is otherwise unnecessary to the City's review under facts and circumstances in that particular case. Any written exemption will be limited to the project discussed at the pre-submittal conference and will not be extended to any other project.

(2) **Submittal Appointment.** All applications must be filed with the City at a pre-scheduled appointment. Applicants may generally submit one application per appointment, but may schedule successive appointments for multiple applications whenever feasible and not prejudicial to other applicants. Any application received without an appointment, whether delivered in-person or through any other means, will not be considered duly filed unless the applicant received a written exemption from the Zoning Administrator at a pre-submittal conference.

(3) **Appointment Scheduling Procedures.** For any event in the submittal process that requires an appointment, applicants must submit a written request to the Zoning Administrator. The Zoning Administrator shall endeavor to provide applicants with an appointment as soon as reasonably feasible and within five business days after a written request is received.

(d) **Applications Deemed Withdrawn.** To promote efficient review and timely decisions, an application will be automatically deemed withdrawn by the applicant when the applicant fails to tender a substantive response to the City within 90 calendar days after the City deems the application incomplete in a written notice to the applicant. The Zoning Administrator may, in the Zoning Administrator's discretion, grant a written extension for up to an additional 30 calendar days when the applicant submits a written request prior to the 90th day that shows good cause to grant the extension. Delays due to circumstances outside the applicant's reasonable control will be considered good cause to grant the extension.

(e) **Departmental Forms, Rules and Other Regulations.** The City Council authorizes the Zoning Administrator to develop and publish permit application forms, checklists, informational handouts and other related materials for this Chapter. Without further authorization from the City Council, the Zoning Administrator may from time-to-time update and alter the permit application forms, checklists, informational handouts and other related materials as the Zoning Administrator deems necessary or appropriate to respond to regulatory, technological or other changes related to this Chapter. The City Council further authorizes the Zoning Administrator to establish other reasonable rules and regulations, which may include without limitation regular hours for appointments with applicants, as the Zoning Administrator deems necessary or appropriate to organize, document and manage the application intake process. All such rules and regulations must be in written form and publicly stated to provide applicants with prior notice.

18.90.060 DECISIONS

(a) **Notice.**

(1) **General Notice Required for the Application.** Public notice as provided in Section 18.74.140 (Special Use Permit – Notice of Hearing) will be required for any special use permit. Public notice as provided in Section 18.66.030 (Minor Use Permits – Procedure) will be required for any minor use permit. The approval authority shall not act on any application for a wireless facility unless the public notice required by law has occurred.

(2) **Deemed-Approval Notice Procedures.** Not more than 30 days before the applicable FCC timeframe for review expires, and in addition to the public notice required in Section 18.___.060(a)(1), above, an applicant for a special use permit or minor use permit must provide a posted notice at the project site that states the project will be automatically deemed approved pursuant to California Government Code § 65964.1 unless the City approves or denies the application or the applicant tolls the timeframe for review within the next 30 days. The posted notice must be compliant with the provisions in Section 18.04.070 (Required Wording and Size of Notices). The public notice required under this Section 18.___.060(a)(2) will be deemed given when the applicant delivers written notice to the Zoning Administrator that shows the appropriate notice has been posted at the project site.

(3) **Decision Notices.** Within five working days after the approval authority approves, conditionally approves or denies an application for a wireless facility or before the FCC timeframe for review expires (whichever occurs first), the approval authority shall send a written notice to the applicant and all other parties entitled to receive notice. For any denial notice, the approval authority shall include the reasons for the denial either in the notice or as a separate written document.

(b) **Required Findings for Approval.** The approval authority may approve or conditionally approve a duly filed application for a special use permit or minor use permit only when the approval authority finds:

(1) the proposed wireless facility complies with all the findings required for a special use permit or minor use permit in accordance with Section 18.74.120 (Special Use Permit – When Permitted);

(2) the proposed wireless facility complies with all applicable development standards described in Section 18.90.080;

(3) the applicant has demonstrated that its proposed wireless facility will be in compliance with all applicable FCC rules and regulations for human exposure to RF emissions;

(4) the applicant has demonstrated a good-faith effort to identify and evaluate more-preferred locations and potentially less-intrusive designs; and

(5) the applicant has provided the approval authority with a meaningful comparative analysis that shows all less-intrusive alternative locations and designs identified in the administrative record are either technically infeasible or not potentially available.

(c) **Conditional Approvals.** The approval authority may impose any reasonable conditions on any special use permit or minor use permit, related and proportionate to the subject matter in the application, as the approval authority deems necessary or appropriate to promote and ensure conformance with the General Plan, any applicable specific plan and all applicable provisions in the Vista Development Code.

(d) **Limited Exception for Personal Wireless Service Facilities.** The Planning Commission shall not grant any limited exception, to the site location guidelines in Section 18.90.070 or the development standards in Section 18.90.080, pursuant to this Section 18.90.060(d) unless the Planning Commission finds all the following:

(1) the proposed wireless facility qualifies as a "personal wireless service facility" as defined in 47 U.S.C. § 332(c)(7)(C)(ii), as may be amended or superseded;

(2) the applicant has provided the Planning Commission with a reasonable and clearly defined technical service objective to be achieved by the proposed wireless facility;

(3) the applicant has provided the Planning Commission with a written statement that contains a detailed and fact-specific explanation as to why the proposed wireless facility cannot be deployed in compliance with the applicable provisions in this Chapter, the Vista Development Code, the general plan and/or any specific plan;

(4) the applicant has provided the Planning Commission with a meaningful comparative analysis with the factual reasons why all alternative locations and/or designs identified in the administrative record (whether suggested by the applicant, the City, public comments or any other source) are not technically feasible or potentially available to reasonably achieve the applicant's reasonable and clearly defined technical service objective to be achieved by the proposed wireless facility; and

(5) the applicant has demonstrated that the proposed location and design is the least non-compliant configuration that will reasonably achieve the applicant's reasonable and clearly defined technical service objective to be achieved by the proposed wireless facility, which includes without limitation a meaningful comparative analysis into multiple smaller or less intrusive wireless facilities dispersed throughout the intended service area.

(e) **Appeals.** Any person or entity may appeal a decision by the approval authority in accordance with the standards and procedures in Section 18.04.150 (Appeals), except as modified in this Section 18.90.060(e). On the next available meeting date after the appeal period lapses, or as soon as reasonably feasible thereafter, the appellate body shall hold a *de novo* public hearing to consider and act on the application in accordance with the applicable provisions in the General Plan, any applicable specific plan and all applicable provisions in the Vista Development Code. Appeals from an approval will not be permitted to the extent that the appeal is based on environmental effects from RF emissions that comply with all applicable FCC regulations.

18.90.070 SITE LOCATION GUIDELINES

(a) **Preferred Locations.** All applicants must, to the extent feasible, propose new wireless facilities in locations according to the following preferences, ordered from most preferred to least preferred. Wireless facilities proposed to be sited in the following locations may be eligible for a minor use permit.
   (1) City-owned structures in the public rights-of-way;
   (2) City-owned property;
   (3) parcels within the Vista Business Park Specific Plan, Area B;
   (4) parcels within industrial zones; and
   (5) parcels within commercial zones;

(b) **Discouraged Locations.** The City discourages new wireless facilities in the following locations, ordered from most discouraged to least discouraged, and the approval authority will take into account whether any less discouraged (or more preferred) locations are technically feasible and potentially available. Furthermore, any wireless facility proposed to be sited in the following discouraged locations will require a special use permit:
   (1) all Single-Family Residential zones (which includes, without limitation, OS-R, A-1, E-1, R-1 and R-1-B);
   (2) all properties within any Biological Preserve Overlay as defined in the General Plan;
   (3) all parcels designated as Open Space in the General Plan;
   (4) all parcels within the Historic Downtown Planning District;
   (5) all parcels within the Downtown Specific Plan area; and
   (6) all other locations not identified as "preferred" in section 18.90.070(b).

(c) **Preferred Support Structures.** In addition to the preferred locations described in Section 18.90.070(a), the City also expresses its preference for installations on certain support structures. The approval authority will take into account whether any less discouraged (or more preferred) support structures are technically feasible and potentially available. The City's preferred support structures are as follows, ordered from most preferred to least preferred:
   (1) collocations with existing building-mounted wireless facilities;
   (2) collocations with existing wireless facilities on electric transmission towers;
   (3) collocations with existing freestanding wireless facilities;
   (4) new installations on existing buildings;
   (5) new installations on existing electric transmission towers;
   (6) new freestanding wireless towers;
   (7) [*reserved*]

18.90.080 DESIGN STANDARDS

(a) **Generally Applicable Development Standards.** All new wireless facilities and all collocations or modifications to existing wireless facilities not subject to Section 6409 must conform to the generally applicable development standards in this Section 18.90.080(a).

EXHIBIT
E

PALOS VERDES ESTATES – DRAFT

Chapter 18.55
WIRELESS COMMUNICATIONS FACILITIES

Sections:

18.55.010 Purpose.

A. The purpose of this chapter is to reasonably regulate, to the extent permitted under California and federal law, the installations, operations, collocations, modifications, replacements and removals of various wireless communications facilities ("WCFs") in the city recognizing the benefits of wireless communications while reasonably respecting other important city needs, including the protection of public health, safety, and welfare, aesthetics and local values.

B. The overarching intent of this chapter is to make wireless communications reasonably available while protecting scenic views and preserving the historic rural character and aesthetics of the city. This will be realized by:

1. Minimizing the visual and physical effects of WCFs through appropriate design, siting, screening techniques and location standards;
2. Encouraging the installation of visually-unobtrusive WCFs at locations where other such facilities already exist; and

3. Encouraging the installation of such facilities where and in a manner such that potential adverse aesthetic impacts to the community are minimized.

C. To allow the city to better preserve the established rural character, it is the intent to limit the duration of WCF permits, in most cases, to terms of ten years, and to reevaluate existing WCFs at the end of each term for purposes of further minimizing aesthetic impacts on the community.

D. It is not the purpose or intent of this chapter to:

1. Prohibit or to have the effect of prohibiting wireless communications services; or
2. Unreasonably discriminate among providers of functionally equivalent wireless communications services; or
3. Regulate the placement, construction or modification of WCFs on the basis of the environmental effects of radio frequency ("RF") emissions where it is demonstrated that the WCF does or will comply with the applicable FCC regulations; or
4. Prohibit or effectively prohibit collocations or modifications that the city must approve under state or federal law.

E. The provisions in this chapter shall apply to all permit applications to install, operate or change, including, without limitation, to collocate, modify, replace or remove, any new or existing wireless tower or base station within the city. This chapter does not apply to WCFs owned by or exclusively operated for government agencies, amateur radio stations, satellite dish or other television antennas or other OTARD Antennas, or towers, except to the extent that such towers may be used to support WCFs.

F. Nothing in this chapter is intended to allow the city to preempt any state or federal law or regulation applicable to a WCF.

G. The provisions of this chapter are in addition to, and do not replace, any obligations a WCF permit holder may have under any franchises, licenses, or other permits issued by the city.

18.55.020 Definitions.

For the purpose of this chapter, the following words and phrases shall be defined as follows:

"Antenna" means any system of wires, poles, rods, reflecting discs, dishes, whips, or other similar devices used for the transmission or reception of electromagnetic waves.

"Array" means one or more antennas mounted at approximately the same level above ground on tower or base station.

"Antenna height" means the distance from the grade of the property at the base of the antenna or, in the case of a roof-mounted antenna, from the grade at the exterior base of the building to the highest point of the antenna and its associated support structure when fully extended.

"Base station" means the same as defined by the FCC in 47 C.F.R. § 1.40001(b)(1), as may be amended, which defines that term as follows:

> A structure or equipment at a fixed location that enables [FCC]-licensed or authorized wireless communications between user equipment and a communications network. The term does not encompass a tower as defined in [47 C.F.R. § 1.40001(b)(9)] or any equipment associated with a tower.
>
> (i) The term includes, but is not limited to, equipment associated with wireless communications services such as private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul.
>
> (ii) The term includes, but is not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, regular and backup power supplies, and comparable equipment, regardless of technological configuration (including Distributed Antenna Systems and small-cell networks).
>
> (iii) The term includes any structure other than a tower that, at the time the relevant application is filed with the State or local government under this section, supports or houses equipment described in paragraphs (b)(1)(i) through (ii) of [47 C.F.R. § 1.40001] that has been reviewed and approved under the applicable zoning or siting process, or under another State or local regulatory review process, even if the structure was not built for the sole or primary purpose of providing such support.
>
> (iv) The term does not include any structure that, at the time the relevant application is filed with the State or local government under this section, does not support or house equipment described in paragraphs (b)(1)(i)– (ii) of [47 C.F.R. § 1.40001].
>
> Note: As an illustration and not a limitation, the FCC's definition refers to any structure that actually supports wireless equipment even though it was not originally intended for that purpose. Examples include, but are not limited to, wireless communications facilities mounted on buildings, utility poles and transmission towers, light standards or traffic signals. A structure without wireless equipment replaced with a new structure designed to bear the additional weight from wireless equipment constitutes a base station.

"Camouflaged" or "concealed WCF" means a wireless communications facility that (i) is integrated as an architectural feature of an existing structure such as (but not limited to) a cupola, or (ii) is integrated in an outdoor fixture such as (but not limited to) a flagpole; or (iii) uses a design which mimics and is consistent with nearby natural, or architectural features, or is incorporated into or replaces existing permitted facilities (including but not limited to stop signs or other traffic signs or freestanding light standards) so that the presence of the WCF is not readily apparent.

"Collocation" means the same as defined by the FCC in 47 C.F.R. § 1.40001(b)(2), as may be amended, which defines that term as "[t]he mounting or installation of transmission equipment on an eligible support structure for the purpose of transmitting and/or receiving radio frequency signals for communications purposes." As an illustration and not a limitation, the FCC's definition effectively means "to add" new equipment to an existing facility and does not necessarily refer to more than one wireless communications facility installed at a single site.

"CPUC" means the California Public Utilities Commission or its successor agency.

"Distributed antenna system" or "DAS" means a network of one or more Antennas and related fiber optic nodes typically mounted to or located at streetlight poles, utility poles, sporting venues, arenas or convention centers which provide access and signal transfer for wireless service providers. A distributed antenna system also includes the equipment location, sometimes called a "hub" or "hotel" where the DAS network is interconnected with one or more wireless service provider's facilities to provide the signal transfer services.

"Eligible facilities request" means the same as defined by the FCC in 47 C.F.R. § 1.40001(b)(3), as may be amended, which defines that term as "[a]ny request for modification of an existing tower or base station that does not substantially change the physical dimensions of such tower or base station, involving: (i) [c]ollocation of new transmission equipment; (ii) [r]emoval of transmission equipment; or (iii) [r]eplacement of transmission equipment."

"Eligible support structure" means the same as defined by the FCC in 47 C.F.R. § 1.40001(b)(4), as may be amended, which defines that term as "[a]ny tower or base station as defined in this section, provided that it is existing at the time the relevant application is filed with the State or local government under this section."

"Existing" means the same as defined by the FCC in 47 C.F.R. § 1.40001(b)(4), as may be amended, which provides that "[a] constructed tower or base station is existing for purposes of [the FCC's Section 6409(a) regulations] if it has been reviewed and approved under the applicable zoning or siting process, or under another State or local regulatory review process, provided that a tower that has not been reviewed and approved because it was not in a zoned area when it was built, but was lawfully constructed, is existing for purposes of this definition."

"Facility" means an installation used to transmit signals over the air from facility to facility or from facility to user equipment for any wireless service and includes, but is not limited to, personal wireless services facilities.

"FCC" means the Federal Communications Commission or its successor agency.

"Mock-up" means a temporary, full-sized, structural model built to scale chiefly for study, testing, or displaying a wireless communications facility. It is non-functional and has no power source.

"Monopole" means a single freestanding non-lattice, tubular tower that that is not camouflaged and that is used to act as or support an antenna or antenna arrays.

"OTARD antenna" means antennas covered by the "Over-the-Air Reception Devices" rule in 47 C.F.R. §§ 1.4000 et seq., as may be amended.

"Personal wireless service facilities" means facilities for the provision of personal wireless services, as defined in 47 U.S.C. Section 332(c)(7).

"Personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services, as defined in 47 U.S.C. Section 332(c)(7).

"Public rights-of-way" means the same as defined in Section 12.04.010, which defines the term as "public easements or public property that are used for streets, alleys or other public purposes."

"RF" means radio frequency.

"Screening" means the effect of locating an antenna behind a building, wall, facade, fence, landscaping, berm, and/or other specially designed device so that view of the antenna from adjoining and nearby public street rights-of-way and private properties is eliminated or minimized.

"Section 6409(a)" means Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, codified as 47 U.S.C. § 1455(a), as may be amended.

"Section 6409(a) modification" means a collocation or modification of transmission equipment at an existing wireless tower or base station that does not result in a substantial change in the physical dimensions of the existing wireless tower or base station. For the purposes of a Section 6409(a) modification, the term "substantial change" means the same as defined by the FCC in 47 C.F.R. § 1.40001(b)(7), as may be amended, which defines that term differently based on the particular facility type and location. For clarity, the definition in this chapter organizes the FCC's criteria and thresholds for a substantial change according to the facility type and location.

1. For towers outside the public rights-of-way, a substantial change occurs when:
    a. The proposed collocation or modification increases the overall height more than 10% or the height of one additional antenna array not to exceed 20 feet (whichever is greater); or
    b. The proposed collocation or modification increases the width more than 20 feet from the edge of the wireless tower or the width of the wireless tower at the level of the appurtenance (whichever is greater); or
    c. The proposed collocation or modification involves the installation of more than the standard number of equipment cabinets for the technology involved, not to exceed four; or

d. The proposed collocation or modification involves excavation outside the current boundaries of the leased or owned property surrounding the wireless tower, including any access or utility easements currently related to the site.

2. For towers in the public rights-of-way and for all base stations, a substantial change occurs when:
   a. The proposed collocation or modification increases the overall height more than 10% or 10 feet (whichever is greater); or
   b. The proposed collocation or modification increases the width more than 6 feet from the edge of the wireless tower or base station; or
   c. The proposed collocation or modification involves the installation of any new equipment cabinets on the ground when there are no existing ground-mounted equipment cabinets; or
   d. The proposed collocation or modification involves the installation of any new ground-mounted equipment cabinets that are ten percent (10%) larger in height or volume than any existing ground-mounted equipment cabinets; or
   e. The proposed collocation or modification involves excavation outside the area in proximity to the structure and other transmission equipment already deployed on the ground.
3. In addition, for all towers and base stations wherever located, a substantial change occurs when:
   a. The proposed collocation or modification would defeat the existing concealment elements of the support structure as determined by the director; or
   b. The proposed collocation or modification violates a prior condition of approval, provided however that the collocation need not comply with any prior condition of approval related to height, width, equipment cabinets or excavation that is inconsistent with the thresholds for a substantial change described in this section.

Note: The thresholds for a substantial change outlined above are disjunctive. The failure to meet any one or more of the applicable thresholds means that a substantial change would occur. The thresholds for height increases are cumulative limits. For sites with horizontally separated deployments, the cumulative limit is measured from the originally-permitted support structure without regard to any increases in size due to wireless equipment not included in the original design. For sites with vertically separated deployments, the cumulative limit is measured from the permitted site dimensions as they existed on February 22, 2012—the date that Congress passed Section 6409(a).

"Site" means the same as defined by the FCC in 47 C.F.R. § 1.40001(b)(6), as may be amended, which provides that "[f]or towers other than towers in the public rights-of-way, the current boundaries of the leased or owned property surrounding the tower and any access or utility easements currently related to the site, and, for other eligible support structures, further restricted to that area in proximity to the structure and to other transmission equipment already deployed on the ground."

"Temporary Wireless Facilities" means portable wireless communication facilities intended or used to provide personal wireless services on a temporary or emergency basis, such as a large-scale special event in which more users than usual gather in a confined location or when a disaster disables permanent wireless facilities. Temporary wireless facilities include, without limitation, cells-on-wheels ("COWs"), sites-on-wheels ("SOWs"), cells-on-light-trucks ("COLTs") or other similarly portable wireless communication facilities not permanently affixed to the land.

"Tower" means the same as defined by the FCC in 47 C.F.R. § 1.40001(b)(9), as may be amended, which defines that term as "[a]ny structure built for the sole or primary purpose of supporting any [FCC]-licensed or authorized antennas and their associated facilities, including structures that are constructed for wireless communications services including, but not limited to, private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul, and the associated site." Examples include, but are not limited to, monopoles, mono-trees and lattice towers.

"Transmission equipment" means the same as defined by the FCC in 47 C.F.R. § 1.40001(b)(8), as may be amended, which defines that term as "[e]quipment that facilitates transmission for any [FCC]-licensed or authorized wireless communication service, including, but not limited to, radio transceivers, antennas, coaxial or fiber-optic cable, and regular and backup power supply. The term includes equipment associated with wireless communications services including, but not limited to, private, broadcast, and public safety services, as well as unlicensed wireless services and fixed wireless services such as microwave backhaul."

"Unconcealed" means a wireless communications facility that is not a camouflaged facility and has no or effectively no camouflage techniques applied such that the wireless equipment is plainly obvious to the observer.

"Unlicensed wireless service" means the offering of telecommunications services, using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services, as defined in 47 U.S.C. § 332(c)(7). (Ord. 700 § 2 (Exh. 1), 2012; Ord. 635, 2001)

"Wireless" means any FCC-licensed or authorized wireless communication service transmitted over frequencies in the electromagnetic spectrum.

"Wireless communications facility" or "WCF" means a facility used to provide personal wireless services as defined in 47 U.S.C. Section 332(c)(7)(C); or wireless information services provided to the public or to such classes of users as to be effectively available directly to the public via licensed or unlicensed frequencies; or wireless utility monitoring and control services; or any other FCC licensed or authorized service. A WCF does not include a facility entirely enclosed within a permitted building outside of the rights-of-way where the installation does not require a modification of the exterior of the building; nor does it include a device attached to a building, used for serving that building only and that is otherwise permitted under other provisions of the code. A WCF consists

of an antenna or antennas, including, but not limited to, directional, omni-directional and parabolic antennas, base station, support equipment, and (if applicable) a wireless tower. It does not include the support structure to which the WCF or its components is attached. The term does not include mobile transmitting devices used by wireless service subscribers, such as vehicle or hand held radios/telephones and their associated transmitting antennas, nor does it include other facilities specifically excluded from the coverage of this chapter.

18.55.030 Applicability.

A. Prior to the installation of a new wireless communications facility or a modification or colocation to an existing wireless communications facility that does not constitute an "eligible facilities request" nor qualify for an Eligible Facility Permit, the owner, or occupant with written permission from the owner, of the lot, premises, parcel of land or building on which a wireless communications facility is to be located shall first obtain a Conditional Wireless Facility Permit or Administrative Wireless Facility Permit from the city pursuant to Section 18.55.030.

B. Unless specifically exempt by federal or state law, all applications for the installation of wireless communications facilities that constitute "eligible facilities requests" within the meaning of 47 U.S.C. section 1455(a) require the approval of an Eligible Facility Permit as described in Chapter 18.57 prior to construction of such eligible facility.

C. **Exempted Facilities.** This chapter does not apply to the following:

1. Amateur radio facilities;
2. OTARD antennas;
3. Facilities owned and operated by the city for its use; or
4. Facilities owned and operated by CPUC-regulated electric companies authorized to deliver electrical power in the City for use in connection with electrical power generation, transmission and distribution facilities subject to CPUC General Order 131-D.

D. In addition to the subsections above, installation of a wireless communications facility on public property, including property within the public right-of-way, requires an encroachment permit from the director. At least fifteen days prior to issuing the permit, written notice of the application shall be sent to all property owners within a 300-foot radius of the proposed facility. In issuing the permit, the director shall take into consideration all comments provided by the public, and may impose conditions on the permit prior to its issuance relating to the time, place, and manner of use of the public property. The director may deny the permit if the application is incomplete, or the project does not adequately mitigate the facility's adverse impact on the health, safety or welfare of the community, including, but not limited to, adverse aesthetic impacts arising from the proposed time, place, and manner of use of the public property. In reviewing an application for a wireless communications facility, the director may also deny the permit if he or she determines that the proposed facility is not needed to close a significant gap in coverage. Within 15 days after the determination by the director to issue or deny the

permit, any person may appeal the decision to the planning commission. Should an appeal be made, issuance of the permit shall be stayed. If no appeal is made within the 15-day period, the permit shall be issued. The director may, in his or her discretion, refer any application to the planning commission for a decision on the issuance of the permit. The hearing on the appeal or referral to the planning commission shall be held following at least 15 days' notice to the applicant and all property owners within a 300-foot radius of the proposed facility. The decision of the planning commission shall be based on the same standards as applicable to the director.

E. **Required Permits.** All proposed facilities and collocations or modifications to facilities governed under this chapter shall be subject to either a Conditional Wireless Facility Permit or an Administrative Wireless Facility Permit from the city, unless exempted from this chapter as an eligible facility under Chapter 18.57.

1. **Conditional Wireless Facility Permit.** A Conditional Wireless Facility Permit is required for any new facility, collocation, or modification to an existing facility not subject to Chapter 18.57 located in a public right-of-way or on private property as follows:
    a. All unconcealed facilities;
    b. All facilities in non-preferred locations, as defined in Section 18.55.040;
    c. All non-camouflaged facilities in preferred locations, as defined in Section 18.55.040; and
    d. All other facilities that do not meet the criteria for either an Administrative Wireless Facility Permit described herein or an Eligible Facility Permit described in Chapter 18.57.
2. **Conditional Wireless Facility Permit Approval.** Approval of a Conditional Wireless Facility Permit for a wireless communications facility shall be subject to the following:
    a. All standards and regulations described in Chapter 18.55 contained herein, and any amendments or modifications to the facility as approved through resolution of the planning commission at a noticed public hearing;
    b. No wireless communications facility proposed within 200 feet from any dwelling used or approved for a residential use may be approved unless the proposed facility meets all of the following criteria:
        i. The proposed wireless communications facility is located on public property, including the public right-of-way;
        ii. All non-antenna equipment associated with the proposed wireless communications facility is placed underground, unless otherwise approved by the planning commission;
        iii. No individual antenna on the proposed wireless communications facility exceeds three cubic feet in volume, unless the planning commission otherwise approves camouflage techniques that would justify an alternative size;
        iv. The cumulative antenna volume on any single pole does not exceed nine cubic feet;
        v. The proposed wireless communications facility is located a minimum of two hundred feet from any other wireless communications facility located along the same side of the street; and

vi. The proposed wireless communications facility is located a minimum of two hundred feet from any intersection along any street, unless the city in its proprietary capacity has granted a license or other access agreement for a wireless communications facility to use a city-owned, non-decorative traffic or safety sign pole at such an intersection, in which case no more than one city-owned, non-decorative traffic signal poles at any such intersection shall be permitted to be used to accommodate wireless communications facilities, unless otherwise approved pursuant to Section 18.55.041.

c. A wireless communications facility application must include all of the contents described in Section 18.55.035.

d. All decisions for a wireless communications facility must be in writing and contain the reasons for approval or denial.

e. All approved or deemed-approved wireless communications facilities shall be subject to all the conditions imposed by the planning commission.

f. Noticing requirements and appeal provisions shall follow the procedures described in Section 17.04.100.

3. **Administrative Wireless Facility Permit.** An Administrative Wireless Facility Permit is required for any new facility or collocation or modification to an existing facility as follows:

a. All camouflaged facilities in a non-residential zone that are integrated into the façade and design of an existing building;

b. All camouflaged facilities on an existing structure, other than a utility pole, in a non-residential zone; or

c. Any camouflaged facility on a utility pole in a non-residential zone that is integrated into the pole, well designed, and does not substantially change the appearance of the pole as determined by the director.

4. **Administrative Wireless Facility Permit Approval.** Approval of an Administrative Wireless Facility Permit shall be subject to the following:

a. All standards and regulations for an Administrative Wireless Facility Permit, and any amendments or modifications to an existing Administrative Wireless Facility Permit, must be approved by the director.

b. No non-camouflaged wireless communications facility proposed within 200 feet from any dwelling used or approved for a residential use may be classified as a facility unless the proposed facility meets all of the following criteria:

i. The proposed wireless communications facility is located in the public right of way;

ii. All non-antenna equipment associated with the proposed wireless communications facility is placed underground;

iii. No individual antenna on the proposed wireless communications facility exceeds three cubic feet in volume;

iv. The cumulative antenna volume on any single pole does not exceed nine cubic feet;

v. The proposed wireless communications facility is located a minimum of two hundred feet from any other wireless communications facility located along the same side of an arterial or collector street; and

vi. The proposed wireless communications facility is located a minimum of two hundred feet from any intersection along any arterial street or collector street.

c. All decisions for an Administrative Wireless Facility Permit must be in writing and contain the reasons for approval or denial.

d. All approved or deemed-approved wireless communications facilities shall be subject to all the conditions imposed by the director.

e. Noticing requirements and appeal provisions shall follow the procedures described in Section 17.04.100.

18.55.035 Application Content.

A. All applications for a permit for the installation of a wireless communications facility, whether on private or public property, including the public right-of-way, shall contain the following information:

1. **Legal description.** A legal description of the property where the wireless communications facility is to be installed.

2. **Radius map and certified list.** A radius map and a certified list of the names and addresses of all property owners within 300 feet of the exterior boundaries of the property involved, as shown on the latest assessment roll of the county assessor. For wireless communications facilities in the public right-of-way, the 300 feet shall be measured from any portion of a base station, including antennas, cables, and equipment.

3. **Plot plan.** A plot plan of the lot, premises or parcel of land, showing the exact location of the proposed wireless communications facility (including all related equipment and cables), exact location and dimensions of all buildings, parking lots, walkways, trash enclosures, and property lines.

4. **Elevations and roof plan.** Building elevations and roof plan (for building- and/or rooftop-mounted facilities) indicating exact location and dimensions of equipment proposed. For freestanding facilities, indicate surrounding grades, structures, and landscaping from all sides.

5. **Screening.** Proposed landscaping and/or non-vegetative screening (including required safety fencing) plan for all aspects of the facility.

6. **Manufacturer's specification.** Manufacturer's specifications, including installation specifications, exact location of cables, wiring, materials, color, and any support devices that may be required.

7. **Good-faith letter.** Written documentation demonstrating a good faith effort to locate the proposed facility in the least intrusive location and screened to the greatest extent feasible in accordance with the site selection and visual impact criteria of Section 18.55.040.

8. **Photographs and Photo Simulations.** Photographs and photo simulations that show the proposed facility in context of the site from reasonable line-of-sight locations from public streets or other adjacent viewpoints, together with a map that shows the photo location of each view angle.

9. **Master plan.** A master plan which identifies the location of the proposed facility in relation to all existing and potential facilities maintained by the operator intended to serve the city. The master plan shall reflect all potential locations that are reasonably anticipated for construction within two years of submittal of the application. Applicants may not file, and the city shall not accept, applications that are not consistent with the master plan for a period of two years from approval of a Conditional Wireless Facility Permit or Administrative Wireless Facility Permit unless: (i) the applicant demonstrates materially changed conditions which could not have been reasonably anticipated to justify the need for a wireless communications facility site not shown on a master plan submitted to the city within the prior two years or (ii) the applicant establishes before the planning commission that a new wireless communications facility is necessary to close a significant gap in the applicant's service area, and the proposed new installation is the least intrusive means to do so.

10. **Alternative analysis.** A siting analysis which identifies a minimum of five other feasible locations within or outside the city which could serve the area intended to be served by the facility, unless the applicant provides compelling technical reasons for providing fewer than the minimum. The alternative site analysis should include at least one collocation site, if feasible.

11. **Noise study.** A noise study prepared and certified by an acoustical engineer licensed by the State of California for the proposed facility and all associated equipment including all environmental control units, sump pumps, temporary backup power generators, and permanent backup power generators demonstrating compliance with the city's noise regulations. The noise study must also include an analysis of the manufacturers' specifications for all noise-emitting equipment and a depiction of the proposed equipment relative to all adjacent property lines. In lieu of a noise study, the applicant may submit evidence from the equipment manufacturer that the ambient noise emitted from all the proposed equipment will not, both individually and cumulatively, exceed a one (1) dba increase over ambient noise levels as measured from the property line of any residential property. Within residential zones and properties adjacent to residential zones, sound proofing measures shall be used to reduce noise caused by the operation of a wireless

communications facility and all accessory equipment to a level which would have a no-net increase in ambient noise level as measured from the property line of any residential property.

12. **Traffic control plan.** A traffic control plan when the applicant seeks to use large equipment (e.g. crane) or requires closure or partial closure of a lane. A traffic control plan may be waived at the discretion of the director.

13. **Certificate of public convenience and necessity.** Certification that applicant is a telephone corporation or a statement providing the basis for its claimed right to enter the right-of-way. If the applicant has a certificate of public convenience and necessity (CPCN) issued by the California Public Utilities Commission, it shall provide a true and complete copy of its CPCN.

14. **Mock-up.** A mock-up including all proposed antenna structures, antennas, cables, hardware and related accessory equipment shall be constructed prior to notice being given to the public and at least 15 calendar days prior to a public hearing, in order for the planning commission or the director to assess aesthetic impacts to surrounding land uses and public rights-of-way. This requirement may be waived by the director.

Installation of a mock-up can occur prior to submittal of a formal application provided that the public works director has reviewed the plans for the mock-up and grants approval of an encroachment permit or other valid permit. Prior to installation of a mock-up, the applicant shall provide notice to all residents and homeowners within 300 feet of the proposed mock-up at least 48 hours in advance, and shall provide proof of notice to the public works director.

15. **RF exposure compliance report.** An RF exposure compliance report prepared and certified by an RF engineer licensed by the State of California that certifies that the proposed facility, as well as any collocated facilities, will comply with applicable federal RF exposure standards and exposure limits. The RF report must include the actual frequency and power levels (in watts effective radio power (ERP)) for all existing and proposed antennas at the site and exhibits that show the location and orientation of all transmitting antennas and the boundaries of areas with RF exposures in excess of the uncontrolled/general population limit (as that term is defined by the FCC) and also limit (as that term is defined by the FCC). Each such boundary shall be clearly marked and identified for every transmitting antenna at the project site.

16. **PVHA status.** The Palos Verdes Homes Association, a private corporation established in 1923, has the responsibility for enforcing the Protective Restrictions and providing architectural review and control through an independent Art Jury. The Art Jury reviews plans for all new homes, structures, and all changes to existing properties. The Art Jury makes certain that the project not only meets its standards of architectural type and design, but also considers compatibility with existing structures, site planning, building coverage, height, color and materials. Since the Art Jury has the primary responsibility for architectural design review and

control dating back to 1923, it is recommended but not required that the application process for approval of a new or modified structure begin by submitting preliminary plans, clearly depicting the proposed project, to the Homes Association first for Art Jury preliminary approval. While an application can be submitted concurrently to the city, there may be less overall time consumed and less cost for changes if preliminary Art Jury approval is obtained before submitting plans to the city.

17. **Other information.** Any other information as deemed necessary by the city in order to consider an application for a wireless communications facility.

18. **Fees.** The application shall be accompanied by the appropriate fee as set forth in this chapter. (Ord. 700 § 2 (Exh. 1), 2012; Ord. 635, 2001)

19. **Community Meeting.** In addition to any other action otherwise required by law pertaining to the processing of a Conditional Wireless Facility Permit application, the applicant for which such review is being sought shall take all of the following actions:

a. Send written notice to both the owner(s) of real property, as shown on the latest equalized assessment roll, within 300 feet of the proposed wireless communications facility, and the city planning department, of the pendency of the filing of such an application, including with such notice copies of preliminary drawings of the proposed project at a scale no smaller than one inch equals 16 feet. No application for neighborhood review will be accepted as complete unless it contains evidence acceptable to the director that such notice has been sent.

b. Hold a community meeting at least four weeks before the date of the planning commission meeting at which the application will be heard, and invite the persons entitled to notice pursuant to subsection (B)(1) of this section to attend such meeting to discuss the proposed application. The community meeting shall be held on a non-holiday weekend or during daylight hours and before nine a.m. or after five p.m. on a weekday. The meeting shall be held at the subject property; provided, however, that if the occupancy of the subject property by a tenant or physical conditions at the subject property make it unsafe or infeasible to provide a table and chairs at the subject property, the meeting may be held at another location within the city. The mock-up of the proposed project shall be erected on the subject property before the meeting. The primary location and all alternative sites shall be presented to the community as well as the reasons for the selection of the primary location. Notice of the date, time and place of such meeting shall be sent at least seven days before the meeting and shall be filed with the planning department.

c. If the hearing on the application is continued by the planning commission, the applicant is encouraged, but not required, to hold a further meeting with the persons entitled to notice pursuant to subsection (B)(1) of this section at least one week prior to the continued hearing.

d. If a meeting pursuant to subsection B of this section results in any modifications to the project prior to the planning commission hearing on the project, the applicant shall (1) notify the director of the proposed modifications and (2) explain to the planning commission at the hearing on the matter any discrepancy between the project as proposed in the notice sent pursuant to subsection (B)(1) of this section and the project as presented to the planning commission.

A community meeting may be required at the discretion of the director for an application for an Administrative Wireless Facility Permit or an Eligible Facility Permit.

B. **Effect of State or Federal Law Change.** In the event a subsequent state or federal law prohibits the collection of any information described herein, the director is authorized to omit, modify or add to that request from the city's application form.

C. **Independent Expert.** The director is authorized to retain on behalf of the city an independent, qualified consultant to review any application for a permit for a wireless communications facility. The review is intended to be a review of technical aspects of the proposed wireless communications facility and shall address any or all of the following:

1. Compliance with applicable radio frequency emission standards;
2. Whether any requested exception is necessary to close a significant gap in coverage and is the least intrusive means of doing so;
3. The accuracy and completeness of submissions;
4. Technical demonstration of the unavailability of alternative sites or configurations and/or coverage analysis;
5. The applicability of analysis techniques and methodologies;
6. The validity of conclusions reached or claims made by applicant;
7. The viability of alternative sites and alternative designs; and
8. Any other specific technical issues identified by the consultant or designated by the city.

The cost of this review shall be paid by the applicant through a deposit pursuant to an adopted fee schedule resolution. No permit shall be issued to any applicant which has not fully reimbursed the city for the consultants cost.

18.55.040 Design standards.

The following general design guidelines shall be considered for regulating the location, design, and aesthetics for a wireless communications facility:

A. Site Selection Criteria.

1. **Preferred Locations.** When doing so would not conflict with one of the standards set forth in this subsection or with federal law, wireless communications facilities shall be located in the most appropriate location as described in this subsection, which range from the most appropriate to the least appropriate.

a. Collocation on an existing building in a non-residential zone.

b. Collocation on an existing structure or utility pole in a non-residential zone.

c. Location on a new structure in a non-residential zone.

d. Collocation on an existing eligible support structure in the public right-of-way or open space zone, except that the facility may be located in a residential zone if it is necessary to prevent substantial aesthetic impacts and is the least intrusive means.

e. Location on an existing structure, utility pole or street sign pole in the public right-of-way or open space zone, except that the facility may be located in a residential zone if it is necessary to prevent substantial aesthetic impacts and is the least intrusive means.

f. Location on a new structure in the public right-of-way or open space zone, except that the facility may be located in a residential zone if it is necessary to prevent substantial aesthetic impacts and is the least intrusive means.

g. Location in a residential zone consisting of a non-residential use (e.g., churches, temples, etc.).

2. **Non-Preferred Locations.** To the extent feasible, wireless communications facilities shall not be sited in the following locations beginning with the least desirable:

a. Located within a residential zone unless authorized by the commission.

b. Located within 100 feet of a residence or residential building, unless camouflaged in or on a non-residential building.

c. Located at the top of a ridgeline when prominently visible from public viewpoints.

d. Located at the top of a bluff, slope or hill along or adjacent to a roadway where views of the ocean would be significantly obstructed.

e. On a structure, site or in a district designated as a local, state or federal historical landmark, or having significant local historical value as determined by the city council.

f. Within environmentally sensitive areas.

No new facility may be placed in a less appropriate area unless the applicant demonstrates to the satisfaction of the commission that no more appropriate location can feasibly serve the area the facility is intended to serve provided, however, that the commission may authorize a facility to be established in a less appropriate location if doing so is necessary to prevent substantial aesthetic impacts.

3. All facilities (including all related accessory cabinet(s)) shall meet the setback requirements of the underlying zone. If a facility is located in a public right-of-way, the director shall determine appropriate siting and setbacks. In no case shall any portion of a facility be located in a defined front yard or side yard. The planning commission may require additional setbacks and/or restricted location areas than that specified for the underlying zone based on the existing development of the site and/or surrounding land uses.

4. Any freestanding ground-mounted wireless communications facility, including any related accessory cabinet(s), shall apply towards the allowable lot coverage for structures/buildings of the underlying zone. In no case shall any part of a facility alter vehicular circulation within a site or impede access to and from a site. In no case shall a facility alter off-street parking spaces (such that the required number of parking spaces for a use is decreased) or interfere with the normal operation of the existing use of the site.

5. All wireless communications facilities shall utilize unmetered commercial power service, or commercial power metering in the smallest possible enclosure, or wireless power metering in flush to grade vaults. If a commercial power meter is installed and the wireless communications facility can be converted to unmetered or wireless power metering, the permittee shall apply for a permit modification to perform the conversion.

B. Visual Impact.

1. Facilities shall be designed to be as visually unobtrusive as possible. Colors and designs must be integrated and compatible with existing on-site and surrounding buildings and/or uses in the area. Facilities shall be sited to avoid or minimize obstruction of views from adjacent properties.

2. Facilities shall not be of a bright, shiny or glare-reflective finish. The facility shall be finished in a color to neutralize it and blend it with, rather than contrast it from, the sky and site improvements immediately surrounding; provided, that, wherever feasible, a light color shall be used to meet this requirement.

3. If feasible, the base station and all wires and cables necessary for the operation of a facility shall be placed underground so that the antenna is the only portion of the facility that is above ground. If the base station is located within or on the roof of a building, it may be placed in any location not visible from surrounding areas outside the building, with any wires and cables attached to the base station screened from public view. The applicant shall demonstrate to the satisfaction of the planning commission or director that it is not technically feasible to locate the base station below ground.

4. Innovative design to minimize visual impact must be used whenever the screening potential of the site is low. For example, the visual impact of a site may be mitigated by using existing light standards and telephone poles as mounting structures, or by constructing screening structures which are compatible with surrounding architecture.

5. Screening of the facility should take into account the existing improvements on or adjacent to the site, including landscaping, walls, fences, berms or other specially designed devices which preclude or minimize the visibility of the facility and the grade of the site as related to surrounding nearby grades of properties and public street rights-of-way.

6. Landscaping or other screening shall be placed so that the antenna and any other above-ground structure is screened from public view. Landscaping or other screening required by this section shall be maintained by the permittee and replaced as necessary as determined by the director. All existing landscaping that has been disturbed by the Permittee in the course of placement or maintenance of the wireless facility shall be restored to its original condition as existed prior to placement of the wireless facility by the Permittee.

7. The maximum antenna height of any wireless communications facility shall not exceed the maximum height limit of the underlying zone or the maximum permissible height of property upon which the WCF is located, or if the WCF is located in the public right-of-way the maximum permissible height for the immediately-adjacent private property.

18.55.041 Exemptions.

All exemptions granted under this chapter are subject to review and reconsideration by the city council. The applicant always bears the burden to demonstrate why an exemption should be granted. An applicant seeking an exemption under this section on the basis that a permit denial would effectively prohibit a wireless communications facility must demonstrate with clear and convincing evidence all of the following:

A. A significant gap in the applicants service coverage exists; and
B. All alternative sites identified in the application review process are either technically infeasible or not potentially available.

18.55.042 Compliance Report.

A. Within 30 days after installation of a WCF, the applicant shall deliver to the director a written report that demonstrates that its WCF as constructed and normally-operating fully complies with the conditions of the permit, including height restrictions, and applicable safety codes, including structural engineering codes. The demonstration shall be provided in writing to the director containing all technical details to demonstrate such compliance, and certified as true and accurate by qualified professional engineers, or, in the case of height or

size restrictions, by qualified surveyors. This report shall be prepared by the applicant and reviewed by the city at the sole expense of the applicant, which shall promptly reimburse the city for its review expenses. The director may require additional proofs of compliance as part of the application process and on an ongoing basis to the extent the city may do so consistent with federal law.

B. If the initial report required by this section shows that the WCF does not so comply, the permit shall be deemed suspended, and all rights thereunder of no force and effect, until the applicant demonstrates to the city's satisfaction that the WCF is compliant. Applicant shall promptly reimburse the city for its compliance review expenses.

C. If the initial report required by this section is not submitted within the time required, the city may, but is not required to, undertake such investigations as are necessary to prepare the report described in paragraph A. Applicant shall within five days after receiving written notice from the city that the city is undertaking the review, shall deposit such additional funds with the city to cover the estimated cost of the city obtaining the report. Once said report is obtained by the city, the city shall then timely refund any unexpended portion of the applicant's deposit. The report shall be provided to the applicant. If the report shows that the applicant is noncompliant, the city may suspend the permit until the applicant demonstrates to the city's satisfaction that the WCF is compliant. During the suspension period, the applicant shall be allowed to activate the WCF for short periods, not to exceed 120 minutes during any 24-hour period for the purpose of testing and adjusting the site to come into compliance.

D. If the WCF is not brought into compliance promptly, the city may revoke the permit and require removal of the WCF.

18.55.045 Maintenance.

The site and the facility, including but not limited to all landscaping, fencing and related transmission equipment, must be maintained in a neat and clean manner and in accordance with all approved plans and conditions of approval.

18.55.047 Amortization of Nonconforming Facilities.

Any non-conforming facilities in existence at the time this chapter becomes effective must be brought into conformance with this chapter in accordance with the amortization schedule in this Section 18.55.047. As used in this section, the "fair market value" will be the construction costs listed on the building permit application for the subject facility and the "minimum years" allowed will be measured from the date on which this chapter becomes effective.

Fair Market Value on Effective Date	Minimum Years Allowed
Less than $50,000	5
$50,000 to $500,000	10
Greater than $500,000	15

The director may grant a written extension to a date certain not greater than one year when the facility owner shows (1) a good faith effort to cure non-conformance and (2) extreme economic hardship would result from strict compliance with the amortization schedule. Any extension must be the minimum time period necessary to avoid such extreme economic hardship. The director must not grant any permanent exemption from this section.

Nothing in this section is intended to limit any permit term to less than 10 years. In the event that the amortization required in this section would reduce the permit term to less than 10 years for any permit granted on or after _____, 2017, then the minimum years allowed will be automatically extended by the difference between 10 years and the number of years since the city granted such permit. Nothing in this section is intended or may be applied to prohibit any collocation or modification covered under 47 U.S.C. § 1455(a) pursuant to Chapter 18.57 on the basis that the subject wireless communication facility is a legal nonconforming facility.

18.55.048 Temporary Wireless Facilities.

A. Temporary wireless facilities may be placed and operated within the City without an administrative temporary use permit only when a duly-authorized federal, state, county or City official declares an emergency within the City, or a region that includes the City in whole or in part at the location of the temporary wireless facility.

B. By placing a temporary wireless facility pursuant to this Section 18.55.048(B) the entity or person placing the temporary wireless facility agrees to and shall defend, indemnify and hold harmless the City, its agents, officers, officials, employees and volunteers from any and all (1) damages, liabilities, injuries, losses, costs and expenses and from any and all claims, demands, law suits, writs and other actions or proceedings ("Claims") brought against the City or its agents, officers, officials, employees or volunteers for any and all Claims of any nature related to the installation, use, non-use, occupancy, removal, and disposal of the temporary wireless facility.

C. The temporary wireless facility shall prominently display upon it a legible notice identifying the entity responsible for the placement and operation of the temporary wireless facility.

D. Any temporary wireless facilities placed pursuant to this Section 18.55.048(B) must be removed within the earlier of (a) five days after the date the emergency is lifted or (b) upon three (3) days written notice from the public works director or city manager or (c) within one hour if required for public safety reasons by City police or fire officials. In the event that the temporary facility is not removed as required

in this Section 18.55.048(B), the City may at its sole election may remove and store or remove and dispose of the temporary facility at the sole cost and risk of the person or entity placing the temporary facility.

E. Any person or entity that places temporary wireless facilities pursuant to this section must send the public works director or city manager an email notice or deliver a written notice by hand within thirty (30) minutes of the placement followed by a written notice dispatched within twelve (12) hours to the public works director or city manager via prepaid U.S. Mail first overnight delivery, such as U.S. Postal Express Mail or its equivalent, that identifies the site location of the temporary facility and person responsible for its operation.

18.55.050 Revocation.

A. **Grounds for Revocation.** A permit granted under this chapter may be revoked for noncompliance with any enforceable permit, permit condition or law provision applicable to the facility.

B. **Revocation Procedures.**

1. When the director finds reason to believe that grounds for permit revocation exist, the director shall send written notice by Certified U.S. Mail, Return Receipt Requested, to the permittee at the permittee's last known address that states the nature of the noncompliance as grounds for permit revocation. The permittee shall have a reasonable time from the date of the notice to cure the noncompliance or show that no noncompliance ever occurred.
2. If after notice and opportunity to show that no noncompliance ever occurred or to cure the noncompliance, the permittee fails to cure the noncompliance, the city council shall conduct a noticed public hearing to determine whether to revoke the permit for the uncured noncompliance. The permittee shall be afforded an opportunity to be heard and may speak and submit written materials to the city council. After the noticed public hearing, the city council may revoke or suspend the permit when it finds that the permittee had notice of the noncompliance and an enforceable permit, permit condition or law applicable to the facility. Written notice of the city council's determination and the reasons therefor shall be dispatched by Certified U.S. Mail, Return Receipt Requested, to the permittee's last known address. Upon revocation, the city council may take any legally permissible action or combination of actions necessary to protect public health, safety and welfare.

18.55.052 Decommissioned or Abandoned Wireless Communications Facilities.

A. **Decommissioned Wireless Facilities.** Any permittee that intends to decommission a wireless communications facility must send 30-days' prior written notice by United States Certified Mail to the director. The permit will automatically expire 30 days after the director receives such notice of intent to decommission, unless the permittee rescinds its notice within the 30- day period.

B. Procedures for Abandoned Facilities or Facilities Not Kept in Operation.

1. To promote the public health, safety and welfare, the director may declare a facility abandoned when:
   a. The permittee notifies the director that it abandoned the use of a facility for a continuous period of 90 days; or
   b. The permittee fails to respond within 30 days to a written notice sent by Certified U.S. Mail, Return Receipt Requested, from the director that states the basis for the director's belief that the facility has been abandoned for a continuous period of 90 days; or
   c. The permit expires and the permittee has failed to file a timely application for renewal.
2. After the director declares a facility abandoned, the permittee shall have 90 days from the date of the declaration (or longer time as the director may approve in writing as reasonably necessary) to:
   a. Reactivate the use of the abandoned facility subject to the provisions of this chapter and all conditions of approval;
   b. Transfer its rights to use the facility, subject to the provisions of this chapter and all conditions of approval, to another person or entity that immediately commences use of the abandoned facility; or
   c. Remove the facility and all improvements installed solely in connection with the facility, and restore the site to a condition compliant with all applicable codes consistent with the then-existing surrounding area.
3. If the permittee fails to act as required in Section 18.55.052(B)(2) within the prescribed time period, the city council may deem the facility abandoned and revoke the underlying permit(s) at a noticed public meeting in the same manner as provided in Section 18.55.050(B)(2). Further, the city council may take any legally permissible action or combination of actions reasonably necessary to protect the public health, safety and welfare from the abandoned wireless communications facility.

18.55.054 Wireless Communications Facilities Removal or Relocation.

A. **Removal by Permittee.** The permittee or property owner must completely remove the wireless communications facility and all related improvements within 90 days after the (1) the permit expires, (2) the city council properly revokes a permit pursuant to Section 18.55.050(B), (3) the permittee decommissions the wireless communications facility, or (4) the city council properly deems the wireless communications facility abandoned pursuant to 18.55.052(B). In addition and within the 90-day period, the permittee or property owner must restore the former wireless communications facility site area to a condition compliant with all applicable codes and consistent with the then-existing surrounding area.

B. **Removal by City.** The city may, but is not obligated to, remove an abandoned wireless communications facility, restore the site to a condition compliant with all applicable codes and consistent with the then-existing surrounding area, and repair any and all damages that occurred in connection with such removal and restoration work. The city may, but shall not be obligated to, store the removed wireless communications

facility or any part thereof, and may use, sell or otherwise dispose of it in any manner the city deems appropriate in its sole discretion. The last-known permittee or its successor-in-interest and, if on private property, the real property owner shall be jointly liable for all costs incurred by the city in connection with its removal, restoration, repair and storage, and shall promptly reimburse the city upon receipt of a written demand, including any interest on the balance owing at the maximum lawful rate. The city may, but shall not be obligated to, use any financial security required in connection with the granting of the facility permit to recover its costs and interest. A lien may be placed on all abandoned personal property and the real property on which the abandoned wireless communications facility is located for all costs incurred in connection with any removal, repair, restoration and storage performed by the city. The city clerk shall cause such a lien to be recorded with the County of Los Angeles Clerk-Recorder's Office.

C. **Relocation Procedures for Facilities in the Rights-of-Way.** After reasonable written notice to the permittee, the director may require a permittee, at the permittee's sole expense and in accordance with the standards in this chapter applicable to such wireless communications facility, to relocate or reconfigure a wireless communications facility in the public rights- of-way as the director deems necessary to maintain or reconfigure the rights-of-way for other public projects or take any actions necessary to protect public health, safety and welfare. The provisions in this section are intended to include circumstances in which a wireless communications facility is installed on a pole scheduled for undergrounding.

18.55.055 Fee or tax.

The city council may, by resolution, impose any fee or tax permitted by law for the placement of a wireless communications facility. Such fee or tax shall be in addition to any fee imposed by the city council for an application for a Conditional Wireless Facility Permit or Administrative Wireless Facility Permit. (Ord. 700 § 2 (Exh. 1), 2012; Ord. 635, 2001)

18.55.060 Severability.

In the event that a court of competent jurisdiction holds any section, subsection, paragraph, sentence, clause or phrase in this section unconstitutional, preempted, or otherwise invalid, the invalid portion shall be severed from this section and shall not affect the validity of the remaining portions of this section. The city hereby declares that it would have adopted each section, subsection, paragraph, sentence, clause or phrase in this section irrespective of the fact that any one or more sections, subsections, paragraphs, sentences, clauses or phrases in this section might be declared unconstitutional, preempted or otherwise invalid.

Chapter 18.57
ELIGIBLE FACILITIES

Sections:

Section 18.57.010 Purpose.

A. The purpose of this chapter is to adopt reasonable regulations and procedures, consistent with and subject to federal and California state law, for compliance with Section 6409(a) of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112-96, codified in Title 47 of the United States Code section 1455(a), and related Federal Communications Commission regulations codified in Title 47 of the Code of Federal Regulations section 1.40001 et seq.

1. Section 6409(a) generally requires that State and local governments "may not deny, and shall approve" requests to collocate, remove or replace transmission equipment at an existing tower or base station. FCC regulations interpret the statute and create procedural rules for local review, which generally preempt subjective land-use regulations, limit application content requirements and provide the applicant with a "deemed granted" remedy when the local government fails to approve or deny the request within sixty (60) days after submittal (accounting for any tolling periods). Moreover, whereas Section 704 of the Telecommunications Act of 1996, Pub. L. 104-104, codified in Title 47 of the United States Code section 332, applies to only "personal wireless service facilities" (e.g., cellular telephone towers and equipment), Section 6409(a) applies to all "wireless" facilities licensed or authorized by the FCC (e.g., Wi-Fi, satellite, or microwave backhaul).

2. The city council finds that the partial overlap between wireless deployments covered under Section 6409(a) and other wireless deployments, combined with the different substantive and procedural rules applicable to such deployments, creates a potential for confusion that harms the public interest in both efficient wireless communications facilities deployment and deliberately planned community development in accordance with local values. The city council further finds that a separate permit application and review process specifically designed for compliance with Section 6409(a) contained in a chapter devoted to Section 6409(a) will best prevent such confusion.

3. Accordingly, the city of Palos Verdes Estates adopts this chapter to reasonably regulate requests submitted for approval under Section 6409(a) to collocate, remove or replace transmission equipment at an existing wireless tower or base station, in a manner that complies with federal law and protects and promotes the public health, safety and welfare of the citizens of Palos Verdes Estates.

B. This chapter does not intend to, and shall not be interpreted or applied to: (1) prohibit or effectively prohibit personal wireless services; (2) unreasonably discriminate among providers of functionally equivalent personal wireless services; (3) regulate the installation, operation, collocation, modification or removal of wireless communications facilities on the basis of the environmental effects of radio frequency emissions to the extent that such emissions comply with all applicable FCC regulations; (4) prohibit or effectively prohibit any collocation or modification that the city may not deny under California or federal law; or (5) allow the city to preempt any applicable California or federal law.

Section 18.57.020 – Definitions.

All definitions described in Section 18.55.020 are applicable to this chapter. Definitions may contain quotations and/or citations to Title 47 of the Code of Federal Regulations section 1.40001 et seq. In the event that any referenced section is amended, creating a conflict between the quoted definition and the amended language of the referenced section, the definition in the referenced section, as amended, shall control.

Section 18.57.030 – Applicability.

This chapter applies to all permit applications for a collocation or modification to an existing wireless tower or base station submitted for approval pursuant to Section 6409(a) that qualify as an eligible facility. However, the applicant may alternatively elect to seek either a Conditional Wireless Facility Permit or an Administrative Wireless Facility Permit under Chapter 18.55.

Section 18.57.040 Eligible Facility Permit.

Any request to collocate, replace or remove transmission equipment at an existing wireless tower or base station submitted for approval under Section 6409(a) shall require an Eligible Facility Permit subject to the director's approval, conditional approval or denial under the standards and procedures contained in this chapter.

Section 18.57.050 Other Regulatory Approvals Required.

No collocation or modification approved under any Eligible Facility Permit may occur unless the applicant also obtains all other permits or regulatory approvals from other city departments and state or federal agencies. An applicant **may** obtain an Eligible Facility Permit **concurrently with** permits or other regulatory approvals from other city departments **after first consulting with the director**. Furthermore, any Eligible Facility Permit granted under this chapter shall remain subject to the lawful conditions and/or requirements associated with such other permits or regulatory approvals from other city departments and state or federal agencies.

Section 18.57.060 Permit Applications; Submittal and Review Procedures.

A. Permit Application Required. The director may not grant any Eligible Facility Permit unless the applicant has submitted a complete application.

B. Permit Application Content. This section governs minimum requirements for permit application content and procedures for additions and/or modifications to Eligible Facility Permit applications. The city council directs and authorizes the director to develop and publish application forms, checklists, informational handouts and other related materials that describe required materials and information for a complete application in any publicly stated form. Without further authorization from the city council, the director may from time-to-time update and alter the permit application forms, checklists, informational handouts and other related materials as the director deems necessary or appropriate to respond to regulatory, technological or other changes. The materials required under this section are minimum requirements for any Eligible Facility Permit application the director may develop.

1. Application Fee Deposit. The applicable permit application fee established by city council resolution. In the event that the city council has not established an application fee specific to an Eligible Facility Permit, the established fee for an Administrative Wireless Facility Permit shall be required.

2. Prior Regulatory Approvals. Evidence that the applicant holds all current licenses and registrations from the FCC and any other applicable regulatory bodies where such license(s) or registration(s) are necessary to provide wireless services utilizing the proposed wireless communications facility. For any prior local regulatory approval(s) associated with the wireless communications facility, the applicant must submit copies of all such approvals with any corresponding conditions of approval. Alternatively, a written justification that sets forth reasons why prior regulatory approvals were not required for the wireless communications facility at the time it was constructed or modified.

3. Site Development Plans. A fully dimensioned site plan and elevation drawings prepared and sealed by a California-licensed engineer showing any existing wireless communications facilities with all existing transmission equipment and other improvements, the proposed facility with all proposed transmission

equipment and other improvements and the legal boundaries of the leased or owned area surrounding the proposed facility and any associated access or utility easements.

4. Equipment Specifications. Specifications that show the height, width, depth and weight for all proposed equipment. For example, dimensioned drawings or the manufacturer's technical specifications would satisfy this requirement.

5. Photographs and Photo Simulations. Photographs and photo simulations that show the proposed facility in context of the site from reasonable line-of-sight locations from public streets or other adjacent viewpoints, together with a map that shows the photo location of each view angle. At least one photo simulation must clearly show the impact on the concealment elements of the support structure, if any, from the proposed modification.

6. RF Exposure Compliance Report. An RF exposure compliance report prepared and certified by an RF engineer acceptable to the city that certifies that the proposed facility, as well as any collocated facilities, will comply with applicable federal RF exposure standards and exposure limits. The RF report must include the actual frequency and power levels (in watts effective radio power (ERP)) for all existing and proposed antennas at the site and exhibits that show the location and orientation of all transmitting antennas and the boundaries of areas with RF exposures in excess of the uncontrolled/general population limit (as that term is defined by the FCC) and also limit (as that term is defined by the FCC). Each such boundary shall be clearly marked and identified for every transmitting antenna at the project site.

7. Justification Analysis. A written statement that explains in plain factual detail whether and why Section 6409(a) and the related FCC regulations at 47 C.F.R. § 1.40001 et seq. require approval for the specific project. A complete written narrative analysis will state the applicable standard and all the facts that allow the city to conclude the standard has been met—bare conclusions not factually supported do not constitute a complete written analysis. As part of this written statement the applicant must also include (i) whether and why the support structure qualifies as an existing tower or existing base station; and (ii) whether and why the proposed collocation or modification does not cause a substantial change in height, width, excavation, equipment cabinets, concealment or permit compliance.

8. Noise Study. A noise study prepared and certified by an acoustical engineer licensed by the State of California for the proposed facility and all associated equipment including all environmental control units, sump pumps, temporary backup power generators, and permanent backup power generators demonstrating compliance with the city's noise regulations. The noise study must also include an analysis of the manufacturers' specifications for all noise-emitting equipment and a depiction of the proposed equipment relative to all adjacent property lines. In lieu of a noise study, the applicant may submit

evidence from the equipment manufacturer that the ambient noise emitted from all the proposed equipment will not, both individually and cumulatively, exceed the applicable limits set out in the Noise Ordinance.

C. Pre-Application Meeting Appointment. Prior to application submittal, applicants must schedule and attend a pre-application meeting with city staff for all Eligible Facility Permit applications. Such pre-application meeting is intended to streamline the application review through discussions including, but not limited to, the appropriate project classification, including whether the project qualifies for an Eligible Facility Permit; any latent issues in connection with the existing tower or base station; potential concealment issues (if applicable); coordination with other city departments responsible for application review; and application completeness issues. Applicants must submit a written request for an appointment in the manner prescribed by the director. City staff shall endeavor to provide applicants with an appointment within five (5) working days after receipt of a written request.

D. Application Submittal Appointment. All applications for an Eligible Facility Permit must be submitted to the city at a pre-scheduled appointment. Applicants may submit up to three (3) WCF site applications per appointment but may schedule successive appointments for additional applications whenever feasible by the director. Applicants must submit a written request for an appointment in the manner prescribed by the director. City staff shall endeavor to provide applicants with an appointment within five (5) working days after receipt of a written request.

E. Application Resubmittal Appointment. All application resubmittals must be tendered to the city at a pre-scheduled appointment. Applicants may resubmit up to three (3) individual WCF site applications per appointment but may schedule successive appointments for additional applications whenever feasible for the city. Applicants must submit a written request for an appointment in the manner prescribed by the director. City staff shall endeavor to provide applicants with an appointment within five (5) working days after receipt of a written request.

F. Applications Deemed Withdrawn. To promote efficient review and timely decisions, an application will be automatically deemed withdrawn when an applicant fails to tender a substantive response within ninety (90) days after the city deems the application incomplete in a written notice to the applicant. The director may in the director's discretion grant a written extension for up to an additional thirty (30) days upon a written request for an extension received prior to the 90th day. The director may grant further written extensions only for good cause, which includes circumstances outside the applicant's reasonable control.

Section 18.57.070 Notice.

A. Manner of Notice. Within 15 days after an applicant submits an application for an Eligible Facility Permit, written notice of the application shall be sent by First Class United States Mail to:

1. Applicant or its duly authorized agent;
2. Property owner or its duly authorized agent;
3. All real property owners within 300 feet from the subject site as shown on the latest equalized assessment rolls;
4. Any person who has filed a written request with either the city clerk or the city council; and
5. Any city department that will be expected to review the application.

B. Notice Content. The notice required under this section shall include all the following information:

1. A general explanation of the proposed collocation or modification;
2. The following statement: "This notice is for information purposes only; no public hearing will be held for this application. Federal law may require approval for this application. Further, Federal Communications Commission regulations may deem this application granted by the operation of law unless the city approves or denies the application, or the city and applicant reach a mutual tolling agreement."; and
3. A general description, in text or by diagram, of the location of the real property that is the subject of the application.

Section 18.57.080 Approvals; Denials without Prejudice.

Federal regulations dictate the criteria for approval or denial of approval permit application submitted under Section 6409(a). The findings for approval and criteria for denial without prejudice are derived from, and shall be interpreted and applied in a manner consistent with, such federal regulations.

A. Findings for Approval. The director may approve or conditionally approve an application for an Eligible Facility Permit only when the director finds all of the following:

1. The application involves the collocation, removal or replacement of transmission equipment on an existing wireless tower or base station; and
2. The proposed changes would not cause a substantial change.

B. Criteria for a Denial Without Prejudice. Notwithstanding subsection (A), the director shall not approve an application for an Eligible Facility Permit when the director finds that the proposed collocation or modification:

1. Violates any legally enforceable standard or permit condition reasonably related to public health and safety; or

2. Involves a structure constructed or modified without all approvals required at the time of the construction or modification; or
3. Involves the replacement of the entire support structure; or
4. Does not qualify for mandatory approval under Section 6409(a) for any lawful reason.

C. All Eligible Facility Permit Denials Are Without Prejudice. Any "denial" of an Eligible Facility Permit application shall be limited to only the applicant request for approval pursuant to Section 6409(a) and shall be without prejudice to the applicant, the real property owner or the project. Subject to the application and submittal requirements in this chapter, the applicant may immediately resubmit a permit application for either a Conditional Wireless Facility Permit, Administrative Wireless Facility Permit or Eligible Facility Permit as appropriate.

D. Conditional Approvals. Subject to any applicable limitations in federal or state law, nothing in this chapter is intended to limit the city's authority to conditionally approve an application for an Eligible Facility Permit to protect and promote the public health, safety and welfare.

Section 18.57.090 Standard Conditions of Approval.

Any Eligible Facility Permit approved or deemed-granted by the operation of federal law shall be automatically subject to the conditions of approval described in this section.

A. Permit Duration. The city's grant or grant by operation of law of an Eligible Facility Permit constitutes a federally-mandated modification to the underlying permit or approval for the subject tower or base station. The city's grant or grant by operation of law of an Eligible Facility Permit will not extend the permit term for any Conditional Wireless Facility Permit, Administrative Wireless Facility Permit or other underlying regulatory approval and its term shall be coterminous with the underlying permit or other regulatory approval for the subject tower or base station.

B. Accelerated Permit Terms Due to Invalidation. In the event that any court of competent jurisdiction invalidates any portion of Section 6409(a) or any FCC rule that interprets Section 6409(a) such that federal law would not mandate approval for any Eligible Facility Permit(s), such permit(s) shall automatically expire one year from the effective date of the judicial order, unless the decision would not authorize accelerated termination of previously approved Eligible Facility Permits. A permittee shall not be required to remove its improvements approved under the invalidated Eligible Facility Permit when it has submitted an application for either a Conditional Wireless Facility Permit or an Administrative Wireless Facility Permit for those improvements before the one-year period ends. The director may extend the expiration date on the accelerated permit upon a written request from the permittee that shows good cause for an extension.

C. No Waiver of Standing. The city's grant or grant by operation of law of an Eligible Facility Permit does not waive, and shall not be construed to waive, any standing by the city to challenge Section 6409(a), any FCC rules that interpret Section 6409(a) or any Eligible Facility Permit.

D. Compliance with All Applicable Laws. The permittee shall maintain compliance at all times with all federal, state and local statutes, regulations, orders or other rules that carry the force of law ("Laws") applicable to the permittee, the subject property, the facility or any use or activities in connection with the use authorized in this permit. The permittee expressly acknowledges and agrees that this obligation is intended to be broadly construed and that no other specific requirements in these conditions are intended to reduce, relieve or otherwise lessen the permittee's obligations to maintain compliance with all Laws.

E. Inspections; Emergencies. The city or its designee may enter onto the facility area to inspect the facility upon reasonable notice to the permittee. The permittee shall cooperate with all inspections. The city reserves the right to enter or direct its designee the facility and support, repair, disable or remove any elements of the facility in emergencies or when the facility threatens imminent harm to persons or property.

F. Contact Information for Responsible Parties. Permittee shall at all times maintain accurate contact information for all parties responsible for the facility, which shall include a phone number, street mailing address and email address for at least one natural person who is responsible for the facility. All such contact information for responsible parties shall be provided to the director upon permit grant, annually thereafter, and permittee's receipt of the director's written request.

G. Indemnities. The permittee and, if applicable, the non-government owner of the private property upon which the tower/and or base station is installed shall defend, indemnify and hold harmless the city, its agents, officers, officials and employees (i) from any and all damages, liabilities, injuries, losses, costs and expenses and from any and all claims, demands, law suits, writs of mandamus and other actions or proceedings brought against the city or its agents, officers, officials or employees to challenge, attack, seek to modify, set aside, void or annul the city's approval of the permit, and (ii) from any and all damages, liabilities, injuries, losses, costs and expenses and any and all claims, demands, law suits or causes of action and other actions or proceedings of any kind or form, whether for personal injury, death or property damage, arising out of or in connection with the activities or performance of the permittee or, if applicable, the private property owner or any of each one's agents, employees, licensees, contractors, subcontractors or independent contractors. The permittee shall be responsible for costs of determining the source of the interference, all costs associated with eliminating the interference, and all costs arising from third party claims against the city attributable to the interference. In the event the city becomes aware of any such actions or claims the city shall promptly notify the permittee and the private property owner and shall reasonably cooperate in the defense. It is expressly agreed that the city shall have the right to approve,

which approval shall not be unreasonably withheld, the legal counsel providing the city's defense, and the property owner and/or permittee (as applicable) shall reimburse the city for any costs and expenses directly and necessarily incurred by the city in the course of the defense.

H. Adverse Impacts on Adjacent Properties. Permittee shall undertake all reasonable efforts to avoid undue adverse impacts to adjacent properties and/or uses that may arise from the construction, operation, maintenance, modification and removal of the facility. Radio frequency emissions, to the extent that they comply with all applicable FCC regulations, are not considered to be adverse impacts to adjacent properties.

I. General Maintenance. The site and the facility, including but not limited to all landscaping, fencing and related transmission equipment, must be maintained in a neat and clean manner and in accordance with all approved plans and conditions of approval.

J. Graffiti Abatement. Permittee shall remove any graffiti on the wireless communications facility at Permittee's sole expense subject to the provisions of Chapter 8.49.

Section 18.57.100 Notice of Decision; Appeals.

A. An application for an eligible facilities request shall be filed with the director on a form prescribed by the director.

B. Each decision of the director to approve an eligible facilities request shall be reported to the city council and the planning commission according to procedures established by the director. Notice of the decision shall be mailed to the applicant and all owners of real property within 300 feet of the subject site as shown on the latest equalized assessment rolls at the time the application was submitted.

C. An interested party may appeal a decision of the director under this section to the planning commission by filing a written appeal with the director within fifteen days after such decision and paying the established appeal fee. The planning commission shall approve, approve with conditions, or disapprove the application in accordance with applicable criteria and requirements specified by law. The planning commission determination shall be final unless appealed to city council.

D. Fees for an eligible facilities request and for an appeal of a determination thereon shall be levied as provided for by this code and established by resolution of the city council.

Section 18.57.110 Independent Consultant Review.

A. Authorization. The city council authorizes the director to, in his or her discretion, select and retain an independent consultant with expertise in communications satisfactory to the director in connection with any permit application.

B. Scope. Subject to the provisions of subsection (C), the director may require the applicant to provide, at applicant's sole cost, independent consultant review on any issue that involves specialized or expert knowledge in connection with the permit application. Such issues may include, but are not limited to:

1. Permit application completeness or accuracy;
2. Planned compliance with applicable federal RF exposure standards;
3. Whether and where a significant gap exists or may exist, and whether such a gap relates to service coverage or service capacity;
4. Whether technically feasible and potentially available alternative locations and designs exist;
5. The applicability, reliability and sufficiency of analyses or methodologies used by the applicant to reach conclusions about any issue within this scope; and
6. Any other issue that requires expert or specialized knowledge identified by the director.

C. Deposit. The applicant must pay for the cost of any review required under subsection (B) and for the technical consultant's testimony in any hearing as requested by the director and must provide a reasonable advance deposit of the estimated cost of such review with the city prior to the commencement of any work by the technical consultant. The applicant must provide an additional advance deposit to cover the consultant's testimony and expenses at any meeting where that testimony is requested by the director. Where the advance deposit(s) are insufficient to pay for the cost of such review and/or testimony, the director shall invoice the applicant who shall pay the invoice in full within 10 calendar days after receipt of the invoice. No permit shall issue to an applicant where that applicant has not timely paid a required fee, provided any required deposit or paid any invoice as required in the Code.

Section 18.57.120 Compliance Obligations.

An applicant or permittee will not be relieved of its obligation to comply with every applicable provision in the Code, this chapter, any permit, any permit condition or any applicable law or regulation by reason of any failure by the city to timely notice, prompt or enforce compliance by the applicant or permittee.

Section 18.57.130 Conflicts with Prior Ordinances.

If the provisions in this chapter conflict in whole or in part with any other city regulation or ordinance adopted prior to the effective date of this chapter, the provisions in this chapter will control.

Section 18.57.140 Duty to Retain Records.

The permittee must maintain complete and accurate copies of all permits and other regulatory approvals (collectively, the "Records") issued in connection with the wireless facility, which includes without limitation this approval, the approved plans and photo simulations incorporated into this approval, all conditions associated with this approval and any ministerial permits or approvals issued in connection with this approval. In the event that the permittee does not maintain such Records as required in this condition or fails to produce true and

complete copies of such Records within a reasonable time after a written request from the city, any ambiguities or uncertainties that would be resolved through an inspection of the missing Records will be construed against the permittee.

Section 18.57.150 Severability.

In the event that a court of competent jurisdiction holds any section, subsection, paragraph, sentence, clause or phrase in this section unconstitutional, preempted, or otherwise invalid, the invalid portion shall be severed from this section and shall not affect the validity of the remaining portions of this section. The city hereby declares that it would have adopted each section, subsection, paragraph, sentence, clause or phrase in this section irrespective of the fact that any one or more sections, subsections, paragraphs, sentences, clauses or phrases in this section might be declared unconstitutional, preempted or otherwise invalid.

EXHIBIT
F

13-2921-cv
Crown Castle v. Town of Greenburgh

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007 IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of January, two thousand fourteen.

PRESENT: REENA RAGGI,
DENNY CHIN,
CHRISTOPHER F. DRONEY,
Circuit Judges,

- -x

CROWN CASTLE NG EAST INC.,
Plaintiff-Appellee,

-v.- 13-2921-cv

TOWN OF GREENBURGH, NEW YORK, TOWN BOARD OF THE TOWN OF GREENBURGH, NEW YORK,
Defendants-Appellants.

- -x

FOR PLAINTIFF-APPELLEE: T. SCOTT THOMPSON, Davis Wright Tremaine LLP, Washington, D.C.

FOR DEFENDANTS-APPELLANTS: ANTHONY T. VERWEY (Andrew D.H. Rau, Amanda J. Sundquist, on the brief), Unruh, Turner, Burke & Frees, P.C., West Chester, Pennsylvania.

Appeal from the United States District Court for the Southern District of New York (Seibel, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED.**

Defendants-Appellants Town of Greenburgh and its Town Board (together, the "Town") appeal from a judgment entered on July 9, 2013, to the extent it ordered the Town to grant the applications of plaintiff-appellee Crown Castle NG East Inc. ("Crown Castle") for special permits to install wireless telephone equipment. Judgment was entered after the district court issued its opinion and order on July 3, 2013, granting Crown Castle's motion for summary judgment with respect to Count III of its first amended complaint, which alleged a violation of § 332(c)(7)(B)(iii) of the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 332(c)(7)(B)(iii).[1] See Crown Castle NG East

[1] The district court also granted the Town's motion to dismiss Counts I and II of the first amended complaint, which asserted violations of 47 U.S.C. §§ 253 and 332(c)(7)(B)(ii), respectively. Crown Castle has not appealed the dismissal of these counts.

Inc. v. Town of Greenburgh, N.Y., No. 12-cv-6157, 2013 WL 3357169, at *1 (S.D.N.Y. July 3, 2013).

We assume the parties' familiarity with the facts and record of the underlying proceedings, which we reference only as necessary to explain our decision to affirm.

Crown Castle designs and installs fiber-optic based networks, known as Distributed Antenna Systems ("DAS").[2] Beginning on November 13, 2009, Crown Castle applied for twenty permits to install DAS equipment in the Town of Greenburgh, New York. After a protracted application process, the Town denied the application on July 24, 2012, ostensibly for two reasons: (1) Crown Castle failed to demonstrate a need for the proposed facilities as required by § 285-37(A)(9)(a) of the Town's Antenna Law "and consistent with the law of the Second Circuit," because the facilities were "either purely speculative or for the apparent benefit of a single 'client' of the Applicant"; and (2) Crown Castle failed to demonstrate that the proposed facilities were "of the 'minimum height and aesthetic intrusion,'" as required by § 285-37(A)(9)(b) of the Town's

[2] A DAS is made up of "nodes," each of which uses a small, low-power antenna, laser and amplifier equipment to convert radio frequency signals to optical signals and vice versa.

Antenna Law, because the equipment was either "purely speculative or . . . twice the size needed."

Crown Castle commenced this action below asserting violations of the Act. "The purpose of the [Act] was to encourage competition and facilitate the spread of new technologies." MetroPCS New York, LLC v. City of Mount Vernon, 739 F. Supp. 2d 409, 422 (S.D.N.Y. 2010); see H.R. Rep. No. 104-458, at 113 (1996)(Conf. Rep.); see also City of Rancho Palos Verdes, Cal. v. Abrams, 544 U.S. 113, 115 (2005) (goal of § 332(c)(7) "was reduction of the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers . . . , [through] imposi[tion of] specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of such facilities" (internal citations omitted)). Count III alleged a violation of 47 U.S.C. § 332(c)(7)(B)(iii), which provides that the denial of a request for permission to build a wireless facility must be "in writing and supported by substantial evidence contained in a written record."

In its July 3, 2013 opinion, the district court held that the Town's determination was not supported by "substantial

evidence" as required by Section 332(c)(7)(B)(iii). Crown Castle, 2013 WL 3357169, at *20. This appeal followed.[3]

We review a decision granting summary judgment de novo, after construing all the evidence and drawing all reasonable inferences in favor of the non-moving party. Maraschiello v. City of Buffalo Police Dep't, 709 F.3d 87, 92 (2d Cir. 2013). We affirm substantially for the reasons set forth by the district court in its thorough and well-reasoned opinion.

A. Necessity

The Town concluded that Crown Castle had failed to demonstrate a need for the DAS facilities, as required by § 285-37(A)(9)(a) of the Town's Antenna Law, because the proposed facilities were "either purely speculative or for the apparent benefit of a single 'client' of the Applicant." We agree with the district court that this determination was not supported by substantial evidence.

First, the conclusion that the need was "purely speculative" was belied by the uncontradicted evidence presented

[3] On appeal, the Town moved to stay enforcement of the July 3, 2013, order. Crown Castle opposed the stay and requested an order directing the Town to issue all permits within five days. In an order dated October 21, 2013, this Court denied the motion to stay enforcement as well as the request for an order directing the Town to issue the permits within five days.

in the special permit proceedings. That evidence showed that (1) Crown Castle was a public utility authorized by the New York Department of Public Service to operate as a facilities-based provider and reseller of telephone service, (2) Crown Castle did not have any existing sites in the Town, and (3) Crown Castle's client, MetroPCS, likewise had a gap in service in the area. The fact that Crown Castle had only a single client at the time that would benefit from the proposed facilities was not significant, as there still was a need for the proposed facilities.

Second, the Town based its decision on an incorrect interpretation of the law. The Town suggested that this Court had definitively ruled in Sprint Spectrum L.P. v. Willoth, 176 F.3d 630 (2d Cir. 1999), that a service gap is viewed from the perspective of "users in the given area." As this Court later made clear, however, the question of which perspective to use in determining a service gap -- that of the service provider or that of users in the area -- is unsettled. Omnipoint Commc'ns, Inc. v. City of White Plains, 430 F.3d 529, 535 n.3 (2d Cir. 2005). Thus, the district court was correct in finding that the Town's determination was "premised on an error of law," and that

therefore its determination was "not supported by substantial evidence." Crown Castle, 2013 WL 3357169, at *18.[4]

B. Aesthetic Intrusion

The Town's determination regarding aesthetic intrusion is also not supported by substantial evidence. In its determination, the Town's stated objection was that the proposed installation was not minimally intrusive. While recognizing that "aesthetics can be a valid ground for local zoning decisions," the district court found that "the evidence in the Board's record does not support [the finding] that the size of Plaintiff's proposed shroud box correlates with aesthetic intrusion." Id. at *20 (internal citations omitted). We agree with the district court that the intrusion was de minimus -- the antenna added less than eight feet to existing thirty-foot

[4] We need not decide which perspective is correct, but merely note that Town's suggestion that the law is clear is wrong. Moreover, Willoth and Omnipoint were decided without the benefit of the Federal Communications Commission's subsequent ruling that state or local authorities cannot deny an application "solely because 'one or more carriers serve a given geographic market'" and that doing so unlawfully "'prohibits or ha[s] the effect of prohibiting the provision of personal wireless services,' within the meaning of Section 332(c)(7)(B)(i)(II)." See Petition for Declaratory Ruling (Shot Clock Order), 24 F.C.C. Rcd. 13994, 14016 (2009), petition for review denied, City of Arlington, Tex. v. FCC, 668 F.3d 229 (5th Cir. 2012), aff'd, 133 S. Ct. 1863 (2013). While there may be room in the process to consider the needs of the local community, the state and local authorities cannot ignore the needs of service providers.

utility poles, and photographs in the record show that Crown Castle's installations would be no more intrusive than existing installations of other carriers. In contrast, a more typical cell tower is approximately 100 feet tall. Id. Moreover, the Town did not explicitly find that Crown Castle's proposed shroud boxes would constitute an aesthetic intrusion; it merely speculated that the boxes could be smaller, without proof in the record that this was so. Id. Moreover, even assuming a smaller box were available, the aesthetic intrusion created by the proposed box was still de minimus. The Town's denial was, therefore, not supported by substantial evidence.

We have considered the Town's remaining arguments and find them to be without merit. Accordingly, we **AFFIRM** the judgment of the district court.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, CLERK